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On Preemption, Congressional Intent, and Conflict of Laws

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ARTICLES

ON PREEMPTION, CONGRESSIONAL INTENT, AND CONFLICT OF LAWS

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Conflict of laws theory explores how courts should decide which law governs a dispute or transaction when more than one legal authority has a legitimate connection with the dispute, and thus a legitimate claim to having its law applied to it.[1] Conflict of laws theory, thus, explains the delicate balancing act in which courts engage to allocate power among sovereigns with overlapping authority. It seeks to promote and accommodate a variety of goals in achieving this end: respect for sovereignty, respect for legitimate governmental policies and the interests they serve, predictability, certainty, and uniformity in the application of law, among others.[2]

Similarly, preemption doctrine explains how courts decide which law governs a dispute or transaction when more than one governing legal authority

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1. DAVID P. CURRIE ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS v (6th ed. 2001) ("Law comes from many sources. In an ideal world, the authority of these sources would be clearly defined and neatly demarcated, so that no event or occurrence was ever subject to control by more than one law maker or law enforcer. But such is not our world. The power of different bodies to make or administer law is often unclear and, even when clear, frequently overlaps. Conflicts arise, and a way is needed to resolve them.").

2. *See* LEA BRILMAYER, CONFLICT OF LAWS 13-17 (2d ed. 1995); *see also* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.1 (3d ed. 2000) [hereinafter SCOLES & HAY]; RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 1.3, 1.5 (4th ed. 2001).

within a single legal system has legislated[3] in an area encompassing a dispute, giving both authorities a legitimate claim to having their law applied to it. In our federal system, preemption issues arise most often when both the federal government and a state government have defined legal rules which govern a situation.[4] When our Constitution created a federal government of enumerated powers, it created a system of overlapping legal authority. When Congress legislates in a field within its enumerated powers, conflicts inevitably arise over whether, and how much, state authority has been displaced in the process. Overlapping federal and state legal rules often co-exist peacefully. When they can, both will apply concurrently. When they cannot, however, courts must determine which law prevails. Preemption doctrine addresses such conflicts. Preemption doctrine, therefore, is a subset of the larger subject of conflict of laws.

The framers of the Constitution recognized that conflicts of law would arise in our federal system and included a provision which defines a basic premise for resolving those conflicts: the Supremacy Clause. That Clause states that federal law "shall be the supreme law of the land."[5] The Supremacy Clause does not further define *when* federal law is supreme, however, and the circumstances in which federal law is supreme over state law

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3. The term "legislated" in this context means that a legal principle, either statutorily or judicially derived, has been defined by a governing legal authority as applicable to a particular dispute or transaction. "Legislative jurisdiction" can be contrasted with "adjudicative jurisdiction," which refers to the power of a court to resolve a dispute involving the parties and the subject matter before it. *See generally* SCOLES & HAY, *supra* note 2, § 5.17, at 319; WEINTRAUB, *supra* note 2, § 4.1, at 114-16 (defining jurisdiction to adjudicate).

4. *See generally* Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913, 917-25 (2004); *see also* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L. REV. 967, 968 (2002) (providing an introduction to preemption).

Preemption issues also arise when state and local governments have conflicting regulations that putatively govern a particular subject. Such preemption issues are similar to those that arise in the federal/state arena. *See, e.g.*, Cohen v. Bd. of Appeals, 795 N.E.2d 619 (N.Y. 2003) (discussing right of localities to govern in matters of local concern in the context of "the Legislature's transcendent interest in regulating matters of Statewide importance"). Local governments exist by virtue of state authority, in contrast to our Federal government, which exists as a result of sovereign states ceding authority to it during its creation. Therefore, state and local government preemption doctrines involve issues outside the scope of this Article.

5. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (providing background information and studies of the early history of preemption and the supremacy clause); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

are not self-evident. Any number of situations exist in which it might not be desirous for federal legislation to displace state law, but rather that federal legislation operate consistently with state law. Furthermore, some circumstances may require total federal displacement of even consistent state law. And many circumstances in between will require that federal legislation displace some, but not all, state law. Determining the circumstances in which federal law is supreme, therefore, requires a methodology.

The Supremacy Clause does not provide that methodology, but rather acts as a choice of law provision that operates as a default rule: as between two otherwise applicable legal rules, federal and state, the federal law controls.[6] The Supreme Court has long framed the inquiry under the Supremacy Clause as a search for congressional intent to displace, or preempt, state law.[7] Sometimes the Court has found this intent in an express preemption provision directed to the issue.[8] Sometimes the Court has concluded that an express preemption provision does not reliably indicate the proper scope of federal displacement of state law.[9] When preemptive scope is not found fully in an express provision, the Court has defined the inquiry as a search for "implied preemption." At this stage in the Court's methodology, the search is no longer for legislative intent to preempt. Rather, the Court is attempting to accommodate the conflicting objectives of two sovereigns—federal and state—with legitimate claims to authority over the subject.

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6. *See* Ausness, *supra* note 4, at 918-19 (noting that some scholars suggest that "the Supremacy Clause operates like a 'choice of law' provision to ensure that federal law will prevail over state law in the event of a conflict.").

7. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (stating that when Congress defined the scope of an express preemption provision, with a "reliable indicium" of its intent, that scope controls the preemption analysis). *See* Davis, *supra* note 4, at 968-70.

8. *Cipollone*, 505 U.S. at 516, 531-32, 545-46 (concluding that preemption analysis should proceed by an interpretation of the scope of the express preemption provision); *see also* Malone v. White Motor Corp., 435 U.S. 497, 512 (1978) (indicating that Congress intended the Employee Retirement and Income Security Act (ERISA) to provide express preemption rather than leaving the responsibility to the states).

9. Freightliner Corp. v. Myrick, 514 U.S. 280, 288-89 (1995). The Court stated:

> The fact that an express definition of the pre-emptive reach of a statute "implies"—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption.... At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

Id. See also Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000); Medtronic, Inc. v. Lohr, 518 U.S. 470, 505 (1996) (Breyer, J., concurring) (finding "clear congressional command" to preempt is required to foreclose implied preemption analysis).

When the Supreme Court decides that federal law impliedly preempts state law, it does so not because Congress in any meaningful sense "intended" it, but, rather, in lieu of that intent. The implied preemption methodology requires a search for an "actual conflict" between federal and state law.[10] Upon identifying an actual conflict, the default rule of the Supremacy Clause operates and federal law applies. Anything other than an "actual conflict" results in the application of state law. Identifying the principles that govern the determination of an actual conflict is, therefore, critical to understanding implied preemption analysis.

Choice of law theories incorporate a variety of methods to determine whether a true or actual conflict exists between two applicable legal rules. Because of the primary importance of respecting sovereign authority in multi-state choice of law problems, as well as federal-state choice of law problems, there is much at stake in determining the existence of a conflict. This article proposes that applying choice of law theory to the Court's implied preemption analysis sheds light on this difficult, but central, inquiry. When choice of law theory is applied to the Supreme Court's recent preemption doctrine, the underlying factors which have influenced resolution of these important preemption issues are clarified. Once clarified, a fuller critique of those factors occurs, out from under the cloak of supposed congressional intent.

Conflicts scholars and jurists for centuries have sought an answer to the question of "what law controls?" by balancing a number of considerations. Chief among those considerations are the legitimate political and policy concerns of conflicting sovereigns.[11] This article analyzes the Supreme Court's recent preemption decisions with an understanding of these theories and their underlying considerations. That analysis reveals that the Court's recent preemption decisions incorporate two modern conflict of laws theories: Governmental Interest Analysis[12] and its corollary, Comparative Impairment.[13]

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10. *See infra* notes 86-87 and accompanying text.

11. For an excellent explanation of the evolution of conflict of laws theory, see Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 11-26 (2001) (discussing works of prominent conflict theorists such as Joseph Story, Walter W. Cook, David F. Cavers, Brainerd Currie, Arthur von Mehren, and Russell Weintraub).

12. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963) [hereinafter CURRIE, SELECTED ESSAYS]. Professor Currie's work has been analyzed at length and one of the most widely regarded explanations is Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 13 (1990). *See* BRILMAYER, *supra* note 2, at 49 n.6 ("It seems likely that [Professor Kay's] defense will come to be accepted as the authoritative treatment of Currie's work.").

13. *See generally* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (discussing deficiencies in current doctrines and suggestions for reform).

Each of these theories builds on the notion that a choice of law analysis should be motivated by selecting the applicable law based on a study of the purposes behind the laws in conflict, and choosing the law whose purposes would be promoted if applied to the instant case.[14] When viewed in this light, often there is no underlying purposive conflict in the laws. In that instance, only one law should apply—the one whose objectives will be furthered if applied. The Supreme Court's implied preemption jurisprudence and its determination of those actual conflicts which trigger the application of federal law is consistent with these conflict of laws theories.

In Section I of this article, some basic conflict of laws theory is explained, with an emphasis on Governmental Interest Analysis and Comparative Impairment. In Section II, the Supreme Court's modern preemption cases are discussed to provide a background on current preemption analysis. Torts and products liability preemption cases are employed because they raise most vividly the important choice courts face in federal preemption matters between traditional state regulation through the common law and federal regulation through specific proscriptions. Many other preemption issues exist,[15] but those involving products liability and other tort actions seem most to reflect the tension between federal and state interests when regulating fundamental matters of public health and safety.[16]

Section III integrates the conflict of laws theories from Section I with the preemption doctrine of Section II to explain how the Court's implied preemption doctrine uses a modified Governmental Interest Analysis to determine whether an actual conflict exists. This section discusses the application of Governmental Interest Analysis and its corollary Comparative Impairment to preemption doctrine and identifies the value of such an

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14. Much debate in choice-of-law circles has been conducted over the propriety of using a purposive approach to choice of law, and both Governmental Interest Analysis and Comparative Impairment have been praised and criticized in that debate. *See, e.g.*, Symposium, *Choice of Law: How it Ought to Be*, 48 MERCER L. REV. 623 (1997). This article does not enter that debate. Rather, it observes that the purposive approach to choice of law reflected in many modern choice of law theories, predominantly Governmental Interest Analysis and Comparative Impairment, is found in the Supreme Court's preemption jurisprudence.

15. *See generally* Davis, *supra* note 4, at 97 (discussing history of preemption analysis generally, including cases involving labor, environmental, employee benefits issues, and others).

16. Indeed, federal preemption of common law tort damages actions has been particularly high profile in recent years, causing the most difficulty for the Court in articulating its preemption analysis. *See, e.g.*, Ausness, *supra* note 4, at 913; *see also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2112-17 (2000); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); M. Stuart Madden, *Federal Preemption of Inconsistent State Safety Obligations*, 21 PACE L. REV. 103, 104 (2000); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 412-13 (2003).

analysis. This section notes the important similarities, and acknowledges the differences, between the noted conflict of laws theories and their application to federal preemption. Most importantly, the conflict of laws principles the Court uses to identify actual conflicts are examined and applied.

Finally, Section IV explains the normative value of Governmental Interest Analysis and Comparative Impairment as applied to federal preemption. The article argues that the Court's use of Governmental Interest Analysis and Comparative Impairment is appropriate to resolve implied preemption cases because: (1) it provides a methodology for courts to follow to identify the actual conflicts that require federal preemption; (2) it reveals the critical factors that influence the analysis under the Supremacy Clause; and (3) it will lead to increased predictability in, and understanding of, the application of federal preemption. Understanding the underlying conflict of laws inquiry provides greater clarity to the Court's otherwise opaque preemption jurisprudence.

I. SOME BASIC CONFLICT OF LAWS THEORY—IN PARTICULAR, GOVERNMENTAL INTEREST ANALYSIS AND COMPARATIVE IMPAIRMENT

Early choice of law theory relied on jurisdiction-selecting rules based on predefined, purportedly neutral criteria to select the governing law.[17] Modern choice of law theory[18] seeks instead to effectuate the substantive concerns of sovereigns by using content-selecting methods that explore the purposes behind the laws in conflict to determine which sovereign has an actual interest in vindicating its policy.[19] Often that process will determine that only one

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17. *See generally* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). Story is considered the father of the conflict of laws in the United States. E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 193-94 (1947). Professor Joseph Beale, the Reporter for the *Restatement (First) of Conflict of Laws* [hereinafter *First Restatement*], is the primary twentieth century proponent of a jurisdiction-selecting approach to choice of law. Such an approach is based on the notion that rights are created based on the laws of places where certain critical events take place. *See generally* BRILMAYER, *supra* note 2, § 1.2. "A territorially-oriented choice-of-law rule is one that points to a geographical location as to the source of the applicable law before any inquiry is made into the content of that law." WEINTRAUB, *supra* note 2, § 3.1, at 52.

18. Choice of law theory in the United States is said to have undergone a revolution in the mid-twentieth century. *See* Friedrich K. Juenger, *How Do You Rate a Century?*, 37 WILLAMETTE L. REV. 89, 99-107 (2001). A number of choice of law theories have been proposed over the past several decades to take the place of the traditional, jurisdiction-selecting approach of Professor Beale and the *First Restatement*. For an explanation of these theories generally, *see* SCOLES & HAY, *supra* note 2, §§ 2.9-2.13, at 25-58.

19. *See* CURRIE, SELECTED ESSAYS, *supra* note 12, at 183-84.

state has an interest in having its law applied to the underlying dispute. When that is the case, the interested state's law applies rather effortlessly. When actual conflicts exist, modern choice of law rules incorporate default rules as the tie-breaker, much as the Supremacy Clause operates as a default rule in cases of implied preemption conflicts.

Modern choice of law theories require the determination of whether an actual conflict exists between two applicable laws. Modern theories recognize, in a way that the traditional territorial theory did not, that only when an actual conflict exists between the purposes behind the application of two conflicting laws is there a need to make a choice between them. Sometimes even when more than one law *can* apply to a dispute, only one of those laws *ought* to apply to that dispute based on an understanding of what those laws were intended to accomplish, and when.

The foremost author of a purposive, or content-selective, approach to choice of law is Professor Brainerd Currie who began what has been called the "American Conflicts Revolution."[20] Professor Currie proposed that a search for the purposes, or intent, behind substantive rules in conflict would reveal that in a significant number of circumstances, no actual, or "true," conflict existed in the application of those rules because the involved sovereigns would likely agree that only one of them had an interest in having its law applied.[21] That understanding would come as a result of exploring the reasons behind the laws in conflict and determining when the states in issue have a legitimate interest in application of those laws. Courts are to determine the reasons behind the laws in conflict in much the same way they do in other circumstances—by rules of statutory construction and legislative interpretation that revealed what the respective legislatures intended.[22]

When only one state is interested in application of its law because the purposes behind only one state's law would be advanced if applied in the given case, a false conflict exists and the only interested state's law should apply.[23] Resolution of a false conflict is an easily digested portion of Governmental Interest Analysis. The most frequently criticized feature of

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20. *See* Juenger, *supra* note 18, at 99; Arthur T. von Mehren, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 133, 135 (2001). *See also* Herma Hill Kay, *Currie's Interest Analysis in the 21st Century: Losing the Battle, But Winning the War*, 37 WILLAMETTE L. REV. 123, 124 (2001) ("Currie's contemporaries, both in the United States and in other countries, regarded his approach as revolutionary.").

21. *See generally* CURRIE, SELECTED ESSAYS, *supra* note 12, at 77-127 (discussing married women's contracts and resulting conflicts).

22. *See id.* at 178.

23. *See id.* at 110.

Governmental Interest Analysis, however, is its resolution of the true conflict.[24] In a true conflict, both involved states are interested in application of their respective laws because the purposes behind each would be promoted if the laws were applied in the underlying matter. An example will illustrate. State A has a rule of comparative fault which would limit, but not bar, a tort plaintiff's recovery if the plaintiff were negligent. Plaintiff is from State A. State B has a rule of contributory negligence which would totally bar a plaintiff from recovering if found to be negligent. The defendant is from State B. The application of State A's law would benefit State A's resident, the plaintiff, and, therefore, arguably promote the purpose of such a rule which can be assumed to be to distribute more fairly losses from negligently inflicted injuries. The application of State B's law would benefit State B's resident, the defendant, and, therefore, promote the purpose of such a rule to protect persons from bearing the losses caused by their negligence when another's negligence has also contributed to it. State A and State B both have an interest in having their laws applied; thus, a true conflict exists.

When a true conflict exists, Governmental Interest Analysis resolves it by operation of a forum default rule: the law of the forum applies because, assuming its law is one of those involved, it has an interest in advancing its own policies and should not be compelled to reject that interest simply because another state also has an interest.[25] This resolution of the true conflict has generally been rejected by courts and academics because of the parochialism inherent in it, as well as the likely promotion of forum shopping.[26] Whatever one thinks of this default rule in the multi-state context,

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24. *See generally* Juenger, *supra* note 18, at 115 (discussing the futility of studying conflict of laws with international issues); *see also* BRILMAYER, *supra* note 2, at 65-68. A significant number of scholars have critiqued Governmental Interest Analysis. *See, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984). Many scholars defend Governmental Interest Analysis. *See, e.g.*, Kay, *supra* note 12, at 1; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977).

25. *See* CURRIE, SELECTED ESSAYS, *supra* note 12, at 109-10. Currie goes on to state that:

> The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law, not because of any notion or pretense that the problem is one relating to procedure, but simply because a court should never apply any other law except when there is a good reason for doing so. That so doing will promote the interests of a foreign state at the expense of the interests of the forum state is not a good reason.

Id. at 119.

26. Kay, *supra* note 20, at 126. *See also* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1592-93 (1985); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277,

it is remarkably similar to the way the Supremacy Clause operates to default to federal law in the event of an actual conflict with a state law.

Before application of the forum default rule in a true conflict, Governmental Interest Analysis requires the forum court to determine whether either state's interest could be alleviated by a more moderate and restrained interpretation of the policies and interests in issue.[27] If so, a false conflict might be uncovered and the law of the only interested state would apply. In this way, the court's original assessment of a forum interest would be subjected to some breathing space to ensure that the forum was not acting purely out of self-interest by defining forum policies and interests too broadly. An opportunity for reflection and neutral assessment would encourage a forum to refrain from exerting its power "to the outermost limit."[28]

The use of a policy-based approach to choice of law is the single most important feature of modern choice of law theories. As conflicts scholar Dean Herma Hill Kay states:

> Currie may have lost the battle of persuading courts to choose forum law in the true conflict case, but he won the war of replacing a jurisdiction-selecting formula with an approach that focuses on the policies and interests underlying the conflicting laws. All the modern United States choice-of-law theories use policy analysis except for those few states that continue to adhere to the vested rights jurisdiction-selecting rules of the first Restatement.[29]

Determining the policies behind the conflicting laws in issue is the critical task, and one which courts do in a variety of circumstances.[30]

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313 (1990). *But see* Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,'* 34 MERCER L. REV. 593, 595 (1983) (concluding that applying forum law produces most functionally sound and fair result).

27. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

28. *Id.* Professor Currie continued: "[T]o assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined." *Id.*

29. Kay, *supra* note 20, at 126. *See also* Robert A. Sedler, *Interest Analysis, "Multistate Policies," and Considerations of Fairness in Conflicts Torts Cases*, 37 WILLAMETTE L. REV. 233, 233 (2001) ("Policy analysis is an essential component of every modern approach to choice of law. . . . It is fair to say that Brainerd Currie's interest analysis approach has been the catalyst for the emergence of policy analysis as the predominant feature of choice of law in the United States today.").

30. *See* Kay, *supra* note 20, at 124 ("After all, as others have observed, [Currie's] method of ascertaining and interpreting the policies of competing laws was used routinely to reconcile conflicting laws in force in a single state, as well as to apply constitutional texts to new situations that the framers had not contemplated.") (citing Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 284-89 (1990) and Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 194-95 (1977)). As will be seen *infra* Section II, the Supreme

How, then, are policies determined and interests identified? Professor Currie suggested that this exercise "is essentially the familiar one of construction or interpretation."[31] Much has been said about the difficulty inherent in ascertaining the purposes of legislation,[32] but courts do it frequently in domestic cases, and, therefore, a similar process can be used in choice of law cases.[33] The sources of such policies include the legislative history, if any, supporting a statutory rule; an understanding of the policies as elaborated upon in prior cases; a consideration of the historical foundation of a particular legal rule; and the writings of other authorities discussing the rule.[34]

Any of a number of cases will illustrate this process. *Babcock v. Jackson*,[35] decided by the New York Court of Appeals, is one of the earliest choice of law decisions that rejected the traditional territorial approach in tort actions. The case involved the application of a guest statute in Ontario, Canada, which would have prevented recovery by a New York plaintiff from a New York driver injured in an Ontario accident.[36] The court of appeals, in refusing to apply the law of the location of the accident, evaluated the purpose of both state's laws by surveying the legislative history of each law in conflict.[37] The court of appeals recognized the general compensatory policy behind the New York rule rejecting a guest statute, and the consequent deterrent of tortious conduct.[38] Further, the court noted that Ontario's guest statute appeared to have as its purpose, based on the scant legislative history, protection of insurers and their insureds from fraudulent claims by guests.[39] The court concluded, however, that Ontario did not have an interest in

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Court's implied preemption analysis requires just such a policies and interests assessment.

31. CURRIE, SELECTED ESSAYS, *supra* note 12, at 183-84.

32. For a sampling of the criticisms of Professor Currie's reliance on ascertaining legislative purposes, see BRILMAYER, *supra* note 2, § 2.3; Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 220-24 (1991).

33. *See* WEINTRAUB, *supra* note 2, at 350 ("The process of identifying these policies may not be easy, but it is the same process that is undertaken for sensible answers to legal questions outside the conflicts arena."). *See also* Kramer, *supra* note 26, at 284-89.

34. WEINTRAUB, *supra* note 2, at 350-51.

35. Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963). Conflict of law scholars debate the current value of a case such as *Babcock* because it applies an antiquated substantive rule, the guest statute. It is a helpful, easy illustration, however, of Professor Currie's conflict categories of true and false conflicts. *See also* Brainerd Currie, *Comments on* Babcock v. Jackson, *A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233-43 (1963).

36. *Babcock*, 191 N.E.2d at 280.

37. *Id.* at 284-85.

38. *Id.* at 284.

39. *Id.*

advancing this policy in the case of a New York vehicle-owner who was not insured in Ontario, but that New York's policy of compensating injured victims would be advanced if applied because the plaintiff was from New York.[40]

Recognizing that often reliable information about legislative intent is unavailable, particularly with state rules, courts have also considered a variety of general policies that may underlie the laws in conflict. Illustrations are found in several cases from California.[41] For example, in *Bernhard v. Harrah's Club*,[42] the California Supreme Court explored the policies behind its dram shop liability, and the policies behind the laws of Nevada which did not recognize such liability. In *Bernhard*, the Nevada defendant served alcohol to an already intoxicated California patron who subsequently caused serious injury to a California plaintiff in a California accident.[43] The court explored the various California legislative enactments which addressed the subject, some in its evidence code, some in its criminal code, but none directly permitted the liability in question.[44] The court explained its prior decision recognizing the liability, which specifically found it unnecessary to wait for

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40. *Id.* at 285. The New York Court of Appeals has evaluated the governmental policies behind a variety of tort principles under its version of governmental interest analysis. *See, e.g.*, Cooney v. Osgood Mach., Inc., 612 N.E.2d 277 (N.Y. 1993) (discussing contribution claims against employer); Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679 (N.Y. 1985) (discussing charitable immunity). These cases serve as good illustrations of a court's assessment of tort principles generally. *See, e.g., Schultz*, 480 N.E.2d at 684-85 ("Thus, when the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort 'will usually have a predominant, if not exclusive, concern' .... Conversely, when the jurisdictions' conflicting rules relate to allocating losses that result from admittedly tortious conduct, as they do here, rules such as those limiting damages in wrongful death actions . . . or immunities from suit, considerations of the State's admonitory interest and party reliance are less important.").

The New York cases have been very influential in modern choice of law analysis. Much scholarly debate has been generated over them. *See generally* Patrick J. Borchers, *New York Choice of Law: Weaving the Tangled Strands*, 57 ALB. L. REV. 93 (1993); Aaron D. Twerski, *A Sheep in Wolf's Clothing: Territorialism in the Guise of Interest Analysis in* Cooney v. Osgood Machinery, Inc., 59 BROOK. L. REV. 1351 (1994).

41. Reich v. Purcell, 432 P.2d 727 (Cal. 1967), adopted Governmental Interest Analysis in California. Professor Currie also looked to the opinions of Justice Roger Traynor of the California Supreme Court as good illustrations of the analysis. *See, e.g.*, Bernkrant v. Fowler, 360 P.2d 906 (Cal. 1961). *See also* CURRIE, SELECTED ESSAYS, *supra* note 12, at 131 (discussing in particular Justice Traynor's opinion in *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953)) ("The California Supreme Court is one of several courts in this country that are making serious efforts to break away from sterile formalism and to develop a rational approach to conflict-of-laws problems.").

42. Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976).

43. *Id.* at 720.

44. *Id.* at 721.

legislative action on the issue.[45] Similarly, the court evaluated the Nevada statutes and cases which did not endorse such liability, and which specifically chose to defer to legislative action whether or not to recognize such liability.[46] The court acknowledged the Nevada policy to protect Nevada tavern owners and its own interest to protect California domiciliaries and those injured on California highways.[47] It was clear to the court that a true conflict existed: "[e]ach state has an interest in the application of its respective law of liability and nonliability."[48]

Bernhard nicely illustrates how courts identify the purposes behind laws in issue and the sources of those purposes. *Bernhard* is important for another reason. It adopted a choice of law theory which resolved true conflicts by a method known as Comparative Impairment, about which more will be said shortly.

Further support for the importance of a purposive analysis in conflict of laws is found in the most widely used modern choice of law theory, the *Restatement (Second) of Conflict of Laws* Most Significant Relationship test.[49] The *Second Restatement* test incorporates a policy-driven approach which endorses the central notion from Governmental Interest Analysis that identifying the purposes and policies in issue is an important component of a choice of law inquiry.[50] In assessing governmental policies and interests, the *Second Restatement* comments state:

> Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in

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45. *Id.*

46. *Id.* at 721-22.

47. *Id.* at 722.

48. *Id.*

49. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971) [hereinafter SECOND RESTATEMENT] (stating that the law of the state of most significant relationship governs choice of law issues in tort and contract). For an annual survey which describes the choice of law landscape and identifies the *Second Restatement* test as the most widely adopted, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 12-15 (2001).

50. SECOND RESTATEMENT, *supra* note 49, § 6(2) (defining general considerations to assist in determining the most significant relationship state). Those considerations include:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

> determining whether to apply its own rule or the rule of another state in the decision of a particular issue.[51]

The *Second Restatement* also considers broader, multi-state policies such as certainty, predictability, and uniformity of result in its assessment of the state with the most significant relationship to the particular issue in dispute.[52]

Once the purposes or policies supporting a legal rule have been identified, Governmental Interest Analysis explores whether the involved states have an interest in having their legal rule applied in the matter. Professor Currie described the interest-creating connections as primarily, though not exclusively, domiciliary in nature—a state generally has an interest in application of its law to its domiciliary.[53] States also have interests in application of their laws when action based on the law is required in the state itself—such as a rule requiring a particular type of conduct. If the state's policy is not furthered by application to the particular facts in issue, then the state cannot be said to have an interest in application of its law. Distinguishing between false and true conflicts is a critically important contribution of Governmental Interest Analysis.

Consider again the original hypothetical involving states with two different approaches to the effect of plaintiff fault on recovery in a tort action.[54] Each state would presumably desire its law to apply because each state's domiciliary would be affected by application in the way the legislatures likely intended. State A's domiciliary, the plaintiff, would not be completely barred from recovery because of State A's law and State B's domiciliary, the defendant, would have its liability eliminated by application of State B's law. Thus, the purposes behind each state's rules would be advanced as a result of application to the matter. A true conflict exists.

Governmental Interest Analysis discourages forum courts from weighing or choosing between conflicting policies or interests. Professor Currie eschewed weighing of either policies or interests because he considered judges to be "in no position to 'weigh' the competing interests, or evaluate their relative merits."[55] He believed that courts were not in a position to make such choices:

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51. *Id.* § 6(2), cmt. e.

52. *See id.* § 6(2)(f). Indeed, many critics of Governmental Interest Analysis suggest that it does not consider broadly applicable policies, like fairness concerns and multi-state goals. *See* BRILMAYER, *supra* note 2, at 82-84; Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 47-74 (1989).

53. CURRIE, SELECTED ESSAYS, *supra* note 12, at 103-04, 145.

54. *See supra* notes 25-26 and accompanying text.

55. CURRIE, SELECTED ESSAYS, *supra* note 12, at 181.

> But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources. Not even a very ponderous Brandeis brief could marshal the relevant considerations . . . .[56]

This particular feature of Governmental Interest Analysis is especially relevant to its application to preemption doctrine. To effectuate the fundamental goal of respecting sovereign prerogatives, choosing between legitimately enacted sovereign policy choices is something courts should do only when absolutely necessary. Consequently, courts should strive, whenever possible, to resolve a potential conflict by determining that there is no conflict. Professor Currie achieved this goal by suggesting that, if a true conflict appeared, the forum state should reexamine the forum policies and interests "with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose."[57]

Professor Currie acknowledged the "serious matter" that recognizing a true conflict presented and counseled against broad conceptions of forum state interests to ensure respect for foreign state interests. Further, he noted that the policy and interest analysis might include some "rational altruism" on the part of the forum state[58] such that forum state policies might be extended to protect non-domiciliaries.[59] As Professor Currie said, "[T]here is room for restraint and enlightenment in the determination of what state policy is and where state interests lie."[60]

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56. *Id.* at 182.

57. Currie, *supra* note 27, at 757. Professor Currie supported this critical feature of interest analysis by reference to a series of United States Supreme Court cases, decided under the Full Faith and Credit clause, which had also rejected weighing of relevant state interests in deciding when states were obligated to apply sister state law. *Id.* at 182-83 (declaring that the Supreme Court has "in the main, realized that 'weighing' competing state policies is not a judicial function."). *See also id.* at 201-14 (evaluating Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532 (1935) and Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939)). Currie concluded that:

> when it is acknowledged that each state has a legitimate, or substantial, interest—an interest sufficient to justify the application of its law so far as the Due Process Clause is concerned—then a conflict is presented that cannot be resolved by the Court: each state is free to apply its own law, consistently with the Full Faith and Credit Clause.

Id. at 204.

58. CURRIE, SELECTED ESSAYS, *supra* note 12, at 186.

59. *Id.*

60. *Id.*

If state legislatures indicated the intended scope of their respective laws, courts would have a much easier job choosing between them. But state legislatures rarely explain the extraterritorial scope of the legislation they enact, just as Congress, which has the power to define the preemptive scope of legislation, often does not.[61] Professor William Baxter, writing at around the same time as Professor Currie, suggested that inquiring into what states might agree to, if they were to negotiate on the extraterritorial scope of their laws, would aid courts in resolving true conflicts.[62] He described this process as one of Comparative Impairment.[63] This corollary to Governmental Interest Analysis resolves a true conflict by considering "[t]he extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category . . . ."[64]

Professor Baxter suggested that "a court can and should go beyond a determination whether a state has *any* governmental interest in the application of its internal law—that a court can and should determine which state's internal objective will be least impaired by subordination in cases like the one before it."[65] To make the determination regarding impairment requires a determination of the "measure of the rule's pertinence"[66] to the particular type of problem in issue.[67] Measuring a rule's "pertinence" is admittedly a difficult exercise and the amorphous nature of this inquiry has been the primary criticism of Baxter's approach.[68] Nevertheless, there is an undeniable appeal to assessing the purposes behind laws in conflict to determine which has the

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61. For a discussion of the difficulty of discerning legislative intent in this context, even if there were some evidence of it, see BRILMAYER, *supra* note 2, § 2.1.1, at 55-58, § 2.5.1, at 101-02. For a discussion of the Supreme Court's difficulty defining the scope of express preemption provisions in federal legislation, see *infra* notes 103-40 and accompanying text.

62. Baxter, *supra* note 13.

63. *Id.* at 18.

64. *Id.* at 9. He continued: "Normative resolution of real conflicts cases is possible where one of the assertedly applicable rules is more pertinent to the case than the competing rule." *Id.*

65. *Id.* at 18.

66. *Id.* at 9.

67. *See also* BRILMAYER, *supra* note 2, § 2.2.1, at 70.

> By asking which state had more at stake, Baxter in essence recognized that conflict of laws was not a zero-sum game, even in true conflict situations. The long-run interests of the states on the whole might be better furthered by applying the law of the state with the more serious governmental concern.

Id.

68. BRILMAYER, *supra* note 2, at 171. *See generally* Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980) (evaluating the use of Comparative Impairment and concluding it causes more problems than it solves).

most to lose in the choice that the court must make. That kind of risk-benefit analysis is a very familiar one to judges and lawmakers.[69]

Unlike Professor Currie who feared giving courts permission to choose one policy over another, Professor Baxter proposed that courts use a normative criterion to decide true conflicts: courts should recognize shared policies, maximize those policies wherever possible, and choose the policy that would be most significantly impacted if not applied. In this way, each state would ultimately, over the life of all cases, be better off because presumably each would cede control over those cases which mattered less and take control over those cases that mattered the most.[70]

The California Supreme Court adopted Comparative Impairment as its choice of law approach in *Bernhard v. Harrah's Club, Inc.*[71] As mentioned above, both states, California and Nevada, had an interest in the application of their respective laws. California would impose liability on the Nevada defendant, a casino, for an accident which an intoxicated driver, who had been served alcohol by the defendant in Nevada, caused in California, injuring a California resident. By contrast, Nevada did not impose civil liability on its tavern keepers, and this protective rule would benefit the Nevada defendant if applied.[72] The California Supreme Court concluded that the California law would be most impaired if not applied.[73] It looked to how the policies in the respective states were carried out in those states—what methods were used to enforce them, for example.[74] In addition, the court emphasized that the defendant had "put itself at the heart of California's regulatory interest" by enticing California patrons to Nevada by regular and purposeful activities intended to tap into the California market.[75] In addition, the Nevada defendant would be subject to a limited additional economic expense if California law applied, which it could anticipate as a result of its efforts to attract California

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69. Professor Baxter's approach has been recognized as an economic analysis because of its emphasis on maximization of social utility. William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1012 (1999).

70. Baxter, *supra* note 13, at 11-17. Courts should seek "maximum attainment of underlying purpose by all governmental entities. This necessitates identifying the focal point of concern of the contending lawmaking groups and ascertaining the comparative pertinence of that concern to the immediate case." *Id.* at 12.

71. Bernhard v. Harrah's Club, 546 P.2d 719 (Cal. 1976).

72. *Id.* at 721.

73. *Id.* at 725.

74. *Id.* (discussing Nevada's criminal statute for selling alcohol to an intoxicated patron, though civil liability was not recognized).

75. *Id.*

business. The liability was, therefore, limited and Nevada's interest in protecting tavern owners was not entirely impaired.[76]

A Comparative Impairment analysis might also include a discussion of how strongly each state holds its policies, reflecting an assessment of the vitality of the policies in issue.[77] A review of the history and current status of the laws in the respective states might permit an assessment of whether the rule's non-application would impair its function.[78] If one of the involved states would not apply its own rule to the interstate dispute, or had not applied it even in domestic cases for some time, that state's law would seem not to have a function that would be impaired if the law were not applied. Further, the adherence to the rule by other states might provide support for the level of impairment its purposes would suffer if not applied.[79] For example, in our original hypothetical, the state which retained contributory negligence as a total bar to recovery might recognize that such a rule is in the distinct minority, having been replaced in the vast number of states with rules of comparative fault. Even though that state might be interested in application of such a law in purely domestic circumstances, the policies behind that law would not be entirely thwarted if not applied in the multi-state circumstance, since it could continue to apply to entirely domestic cases and the defendant's liability might be reduced at least partially under the comparative fault rule. Alternately, the law of comparative fault would be completely thwarted if not applied in this circumstance because the plaintiff would be entirely barred from any compensation. Such an accommodation of the values behind the policies in issue shows a respect both for the legislative policies as well as the parties affected by them.

In summary, most modern choice of law theories incorporate some method of assessing the underlying policies behind the laws in conflict and determining which has the greater claim to being applied in the underlying case. The methodology typically includes the assessment of whether a true or false conflict exists coupled with the application of some default tie-breaking rule in the event of a true conflict. The tie-breakers are various and include the forum default rule in Governmental Interest Analysis and the effort to determine impairment in Professor Baxter's approach. Each of these methods

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76. *Id.*

77. Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721 (Cal. 1978).

78. *Id.* at 726-28 (finding "California's interest in the application of its unusual and outmoded statute" comparatively less strong).

79. *Id.* at 728.

recognizes the importance of determining whether an actual, or true, conflict exists. That process is a purposive one.[80]

The methods courts use to determine the purposes behind domestic laws in conflict also inform modern preemption analysis. The Supreme Court, in determining whether federal law displaces state law for preemption purposes, has endorsed a purposive analysis very much like Governmental Interest Analysis and Comparative Impairment to identify whether an actual conflict exists. The next section explains in some detail the Supreme Court's recent preemption decisions.

II. BASIC PREEMPTION DOCTRINE

The United States Supreme Court has decided a significant number of preemption cases in the last decade, particularly in the area of torts and products liability, where the preemptive effect of federal statutes on traditional state common law damages actions has been of central interest.[81] The Court has struggled with preemption doctrine in this important area, moving from an implied preemption focus,[82] to a strict emphasis on interpreting express preemption provisions,[83] to, most recently, a blend of express and implied preemption doctrines which includes an evolving definition of actual conflict.[84]

Defining the reach of federal legislation is, first, within Congress's power. Consequently, preemption doctrine first seeks Congress's intent on the scope of displacement of state law. If Congress has included an express preemption provision in a statute, that provision must be applied and its scope

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80. A number of other choice of law approaches have been proposed by scholars who also recognize the importance of the underlying purposes of the laws in conflict and seek to explain the proper way to resolve true conflicts that exist between those laws. These methods are also helpful in explaining how to identify and resolve true conflicts, but they build on, rather than deny, the original Governmental Interest Analysis method. *See, e.g.*, Kramer, *supra* note 26; Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

81. Much has been written on federal preemption of state common law damages actions in recent years because of the Court's activity in the area. *See* Davis, *supra* note 4, at 972-1013 (employing an historical treatment of preemption doctrine). On preemption in products liability cases generally, *see* Ausness, *supra* note 4; Owen, *supra* note 16, at 412 n.2 (containing an exhaustive list of scholarship on products liability preemption). *See also* DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, 2 MADDEN & OWEN ON PRODUCTS LIABILITY §§ 28.1-28.8 (3d ed. 2000 & Supp. 2004).

82. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

83. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

84. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

determined. In the absence of an express preemption provision, or when the Court determines that the express preemption provision does not fully indicate preemptive scope in the circumstances, the Court's preemption doctrine incorporates a variety of methods to determine whether preemption should be implied.[85]

The Court has used two categories of implied preemption over the years: (1) occupation of the field preemption, where Congress's legislation is so comprehensive that it occupies the entire field, displacing all state law; and (2) conflict preemption, where the federal and state regulations are in such conflict that state law must yield to the federal because either (a) it is impossible for a party to comply with both federal and state regulation, or (b) state law "stands as an obstacle to the accomplishment" of federal objectives and, therefore, must yield.[86] Use of implied "obstacle" preemption doctrine presents the greatest challenge to courts because the intent of Congress is so clearly not in issue. Obstacle implied preemption calls for an *ex post facto* judicial assessment of congressional objectives and is, thus, quite far removed from a search for congressional intent to preempt.[87] Obstacle implied

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85. A number of commentators have suggested that when an express preemption provision exists, the limit of the Court's authority is to interpret the scope of that provision. Implied preemption doctrines, then, do not apply. *See* Ausness, *supra* note 4, at 969-76; Grey, *supra* note 16.

86. *See* Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712-13 (1985); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Hines v. Davidowitz, 312 U.S. 52, 61, 66-68 (1941). *See generally* Nelson, *supra* note 5, at 226-29; Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1382-84 (1998) (discussing the basic problems associated with preemption and outlining the different forms of implied preemption).

87. *See* Nelson, *supra* note 5, at 276-77. Nelson states that:

> When a federal statute does not expressly address preemption, it is quite possible that members of Congress did not even consider preemption, or at least did not reach any actual collective agreement about how much state law to displace. To the extent the Court is talking about subjective intent at all, the Court appears to be conducting an exercise in "imaginative reconstruction": The Court is trying to reconstruct how the enacting Congress *would have* resolved questions about the statute's preemptive effect *if* it had considered them long enough to come to a collective agreement.

Id. at 277.

For further discussion of the tensions wrought by preemption doctrine, see David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1129 (1999) ("For most judges, whether liberal or conservative, these cases pit one dimension of their ideology, their principles of federalism, against another, their policy preferences or attitudes toward the particular local regulation at issue."). Others have observed the unusual alliances borne of preemption doctrine. *See, e.g.*, Nelson, *supra* note 5, at 229 ("In recent years, conservative advocates of federalism and liberal advocates of government regulation have joined in arguing that the current tests for preemption risk displacing too much state law. This alliance is not as odd as it might seem, because the politics of preemption are complicated.").

preemption, however, is very much like the search for governmental purposes required in Governmental Interest Analysis.

When Congress and the states have both regulated specifically in an area, any potential inconsistency in those regulations could defeat what both sovereigns seek to accomplish. A comparison of the purposes of congressional legislation (and any regulation that stems from it) and the conflicting state regulation often resolves this tension—inconsistencies in the specific requirements will necessarily be resolved in favor of federal law under the Supremacy Clause but many such clashes can be alleviated. Common law damages actions, however, regulate indirectly and do not mandate any particular course of action other than the possible payment of compensation to a successful plaintiff. In the case of federal preemption of common law damages actions, the Court, until recently, presumed that Congress would not displace state law in areas of the states' "historic police powers"— those involving health and safety matters.[88] This presumption against preemption[89] usually saved common law damages actions from being preempted because of their important function in state schemes addressing rights and responsibilities. Common law damages actions have been considered central to state sovereignty given the direct impact that a remedial, compensatory scheme has on state citizens, but insignificant in their impact on the typical congressional regulatory objectives.[90] The Court has backed away from this presumption against preemption and moved to an application of the Supremacy Clause which incorporates an assessment of legislative purposes without the use of any presumptions, coupled with a default to federal law in the case of an actual conflict. The Court's implied preemption analysis is, thus, strikingly similar to Governmental Interest Analysis.

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88. *See, e.g.*, *Rice*, 331 U.S. at 230.

89. *Id.*; *see also* Davis, *supra* note 4, at 968 n.2.

90. Typically, regulations which contain standards of conduct do not also explain their preemptive scope. This is most likely because such standards have always been considered to set minimum, not maximum, standards of due care. RESTATEMENT (SECOND) OF TORTS § 288C cmt. a (1965); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984); OWEN, MADDEN & DAVIS, *supra* note 81, § 27.7; Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance as a Defense in Products Liability*, 88 GEO. L.J. 2049 (2000). *See also infra* notes 91-102 and accompanying text. *But see* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959) (noting in the context of national labor laws that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Many scholars have addressed this issue. *See, e.g.*, Ausness, *supra* note 4, at 967-76; Davis, *supra* note 4, at 968, 1013-14; Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1 (2002).

An important example of the Court's traditional treatment of common law damages actions in implied preemption analysis is found in *Silkwood v. Kerr-McGee Corp.*[91] In *Silkwood*, the Court analyzed for the first time the availability of a common law damages action under implied federal preemption doctrine when the statute in issue did not explicitly address such actions. *Silkwood* involved the Atomic Energy Act (AEA)[92] and its application to a tort action for personal injuries and property damage filed by Karen Silkwood, who alleged contamination with plutonium through irregularities at the Kerr-McGee Corporation nuclear power plant where she worked.[93]

The AEA was enacted in 1954 to free the nuclear energy industry from total federal control and to provide for private involvement.[94] In addition, some limited regulatory authority was given to the states, which had never had any authority over nuclear power.[95] The states were precluded from regulating the safety aspects of nuclear material.[96] Thus, the preemption provision of the AEA carved out of federal dominion some small state regulatory authority.

The Court of Appeals for the Tenth Circuit reversed a trial court finding of no preemption based on a "broad preemption analysis [that] 'any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material' was impermissible."[97] The Supreme Court reversed, concluding unanimously that the AEA did not preempt Silkwood's compensatory damages action.[98] The Court reviewed the Act's legislative history and other congressional actions regarding the AEA.[99] The Court stated, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those

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91. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

92. Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.* (1976 & Supp. V) (current version at 42 U.S.C. §§ 2011-2297h-13 (2000)). The AEA is administered by the Nuclear Regulatory Commission (NRC), formerly the Atomic Energy Commission. *See* 42 U.S.C. § 2073 (defining NRC authority).

93. *See Silkwood*, 464 U.S. at 241-43.

94. *See* 42 U.S.C. §§ 2012-2013 (outlining the Congressional findings and purposes of the AEA).

95. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 194 (1983).

96. 42 U.S.C. § 2021(c)(4).

97. *Silkwood*, 464 U.S. at 246 (citing Silkwood v. Kerr-McGee Corp., 667 F.2d 908, 923 (10th Cir. 1981)). Just one year earlier, the Supreme Court, in *Pacific Gas & Electric Co.*, had concluded that the AEA "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 461 U.S. at 212.

98. See *Silkwood*, 464 U.S. at 256. A majority of the Court held that the AEA did not preempt Silkwood's punitive damages claim either. *Id.* at 258.

99. *See id.* at 249.

injured by illegal conduct."[100] As to the legislative history on preemption, "[t]he only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available."[101] The preemption analysis in *Silkwood* contains, therefore, these two important assumptions about congressional purposes: that Congress would not destroy traditional state means of legal recourse without acknowledging it openly, and that, therefore, Congress presumably intends that traditional means of legal recourse remain.[102]

A short seven years later, the Court would radically change preemption doctrine as it applied to common law damages actions. In *Cipollone v. Liggett Group, Inc.*,[103] the Court, applying preemption doctrine in a products liability action for the first time, concluded that where Congress has included an express preemption provision, and "that provision provides a 'reliable indicium of congressional intent,'" the provision controls and an implied preemption analysis is unnecessary.[104] The Court's task was only to determine the scope of the provision.[105] Rarely had the Court given exclusive control to an express preemption provision, particularly as it applied to common law damages actions.[106] But *Cipollone* changed that, if only temporarily.

Cipollone involved the preemptive effect of the federal cigarette labeling and advertising laws on products liability actions.[107] The Court mentioned the presumption against federal preemption of matters historically within the states' police powers, but emphasized the prominence of discerning congressional intent.[108] All the justices agreed that the preemption analysis

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100. *Id.* at 251. The Court stated:

> Indeed, there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct.

Id.

101. *Id.*

102. *See id. But see id.* at 274, 283 ("This case is a disquieting example of how the jury system can function as an unauthorized regulatory medium.") (Powell, J., dissenting).

103. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

104. *Id.* at 517.

105. *See id.* at 518, 523.

106. *See* Davis, *supra* note 4, at 1001.

107. *See generally Cipollone*, 505 U.S. 504 (discussing the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1341 (1982) (current version at 15 U.S.C. §§ 1331-1341 (2000))).

108. *See Cipollone*, 505 U.S. at 516. The Court stated:

> Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*:

should proceed by an interpretation of the scope of the express preemption provision.[109] Only a plurality of justices agreed on *how* to interpret the particular preemption provisions in question, concluding that they should be interpreted fairly, but narrowly, considering the importance of the presumption against preemption.[110] The plurality opinion, written by Justice Stevens, used both the text of the provisions and the legislative history to preempt some, but not all, common law damages actions imposing liability.[111] The plurality opinion parsed the language of the preemption provisions with particularity in reaching this conclusion.[112] The plurality concluded that the statute "plainly reaches beyond [positive] enactments,"[113] acknowledging that common law damages actions can have an indirect regulatory effect.[114]

Justice Blackmun disagreed vehemently with the conclusion that "at least some" common law damages actions were necessarily precluded under the statute because they constituted some general "requirement or prohibition."[115]

> Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Id. at 517.

The Court of Appeals had rejected express preemption but found implied preemption. Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986) (Congress's "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy" would be upset by state-law damages actions based on noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the federal Act.).

109. *See Cipollone*, 505 U.S. at 507, 516-17; *id.* at 534 (Blackmun, J., concurring in part and dissenting in part); *id.* at 545-56 (Scalia, J., concurring in part and dissenting in part).

110. *See id.* at 518, 523.

111. *See id.* at 520-24 (discussing the change from the preemption provision of the 1965 Act to the provision of the 1969 Act and its effect on interpretation of the provision to preempt more broadly).

112. *Id.* at 524. The 1965 Act's preemption provision stated that "[n]o statement relating to smoking and health" shall be required on cigarette packages or in advertising. 15 U.S.C. § 1334(a)-(b) (Supp. V 1964). The 1969 Act changed the preemption provision slightly to state that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law" regarding cigarette advertising. 15 U.S.C. § 1334(b) (2000). The use of the phrase "requirement or prohibition" was critical to the Court's analysis of whether common-law damages actions were prohibited. *Cipollone*, 505 U.S. at 522-24.

113. *Cipollone*, 505 U.S. at 521 ("The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules.").

114. *See id.* at 524.

115. *See id.* at 536 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun stated:

> More important, the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments . . . is significantly more complicated than the plurality's brief quotation from *San Diego Building Trades Council v. Garmon* would suggest. The effect of tort law on a manufacturer's behavior is necessarily indirect.

Indeed, Justice Blackmun recognized that the Court's preemption cases "ha[ve] declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption."[116] The opinions in *Cipollone* disclose a deepening divide within the Court over the method of preemption analysis.

In its next products liability preemption case, the Court analyzed the express preemption provision of the National Traffic and Motor Vehicle Safety Act (NTMVSA) which provides that states may not maintain "motor vehicle safety standard[s]" which conflict with federal performance standards in effect on the same topic.[117] In *Freightliner Corp. v. Myrick*,[118] defendants, truck manufacturers, sought to preempt product liability actions based on a Federal Motor Vehicle Safety Standard (FMVSS) requiring certain stopping distances for eighteen-wheel trucks that could only be achieved by the use of anti-lock brakes.[119] The standard previously had been successfully challenged by the industry and no standard had been adopted to take its place.[120] Nevertheless, the industry sought preemption on the basis that the National Highway Traffic and Safety Administration (NHTSA), responsible for administering the NTMVSA, had not chosen to require anti-lock brakes, and, therefore, the states could not do so by means of a products liability action.[121]

The Court, in a unanimous opinion by Justice Thomas, concluded that because no federal standard existed, there was no basis for express or implied preemption of state design defect claims based on the absence of such brakes.[122] The Court did not reach the question of whether the NTMVSA would preempt such claims if a federal standard did exist, but, in the course

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Id. at 536 (citation omitted).

116. English v. Gen. Elec. Co., 496 U.S. 72 (1990); *Cipollone*, 505 U.S. at 537-38 (referencing Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)).

117. *See* 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)(1) (2000)).

The Court had applied express preemption analysis to the Federal Railroad Safety Act (FRSA) two years earlier in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993). The Court concluded the FRSA did not preempt state common-law damages actions because the preemption provision specifically exempts concurring, non-conflicting, state regulations from its operation: "Even after federal standards have been promulgated, the States may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards are 'not incompatible with' federal laws or regulations and not an undue burden on interstate commerce." *Id.*; *see infra* notes 142-54 and accompanying text (regarding the FRSA and application of express preemption principles to it).

118. Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

119. *See id.* at 282-84.

120. *Id.* at 286-87.

121. *Id.*

122. *Id.* at 289-90.

of its opinion, the Court questioned *Cipollone's* exclusive reliance on express preemption analysis:

> The fact that an express definition of the pre-emptive reach of a statute "implies"—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption.... At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.[123]

Myrick foreshadowed the resurrection of implied preemption doctrine as it applied to common law damages actions, but no one could foresee the form that doctrine would take. Importantly, *Myrick* involved federal agency actions; *Cipollone* involved Congress's own mandate regarding cigarette labeling requirements. More regulation is done by agencies than directly by federal legislation and, consequently, preemption by federal regulation is by far the most important in practical terms.

The Court's next preemption opinion, *Medtronic, Inc. v. Lohr*,[124] involved the Food and Drug Administration's (FDA's) enforcement of the Medical Device Amendments of 1976 (MDA).[125] The MDA directs the FDA to regulate "the safety and effectiveness of medical devices," which it does depending on the marketing method and type of medical device involved.[126] In *Medtronic*, the defendant sought to preempt the plaintiff's design and manufacturing defect claims regarding its pacemaker because the device was approved through a pre-market notification process under the MDA.[127] The Court was divided on whether the MDA preempted the plaintiffs claims, but all justices again agreed that the express preemption provision controlled the analysis.[128]

The justices hewed closely to the language of the express preemption provision, which stated that states may not impose "requirement[s] . . . different from, or in addition to" any federal requirement related to safety or effectiveness.[129] The pre-market notification process, under which the

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123. *Id.* at 288-89.

124. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

125. *Id.* at 474; *see also* Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976).

126. *See Medtronic*, 518 U.S. at 474-80 (detailing history of MDA and its regulatory scheme).

127. *See id.* at 480-83.

128. *Id.* at 484-85, 503 (Breyer, J., concurring); *id.* at 509 (O'Connor, J., concurring in part and dissenting in part). Justice Stevens' plurality opinion suggested that actual conflict implied preemption analysis may be appropriate in certain circumstances even when an express preemption provision was in issue, citing *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). *Medtronic*, 518 U.S. at 503.

129. 21 U.S.C. § 360k (2000).

pacemaker had been approved, did not include specific design requirements.[130] The plurality opinion, again authored by Justice Stevens, concluded that common law damages actions based on design defects were not "requirements" for purposes of the statute.[131]

Justice Stevens reiterated the express preemption analysis articulated in *Cipollone*:

> [W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action.... [W]e "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [W]e used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.[132]

The plurality interpreted the statute and regulations narrowly and found none of plaintiff's claims preempted, using as support the legislative history and the FDA's own interpretation of its regulation against preemption.[133]

A majority of the justices, four in dissent and Justice Breyer in concurrence, considered that common law damages actions generally do impose requirements, and, therefore, are preempted under the statute if they differ from a federal requirement.[134] Justice Breyer's concurring opinion gave the Court its judgment in the case,[135] and he interpreted the word "requirement" to include common law damages actions in some circumstances.[136] Importantly, Justice Breyer complained of the "highly ambiguous" nature of the preemption provision in issue and concluded that Congress "intended that courts look elsewhere for help as to just which federal requirements preempt just which state requirements, as well as just how they might do so."[137] Justice Breyer stated that express preemption provisions should be interpreted based on their "clear congressional command," if one

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130. This pre-market notification requirement, also known as the 510k notification process, permitted marketing of devices that were substantially equivalent to a device already on the market, but it was not as rigorous as the pre-market approval process required of entirely new devices. See *Medtronic*, 518 U.S. at 476-80 for a description of the processes and their differences. *See generally* SUSAN BARTLETT FOOTE, MANAGING THE MEDICAL ARMS RACE: PUBLIC POLICY AND MEDICAL DEVICE INNOVATION (1992).

131. *See Medtronic*, 518 U.S. at 492-94.

132. *Id.* at 485 (citations omitted).

133. *See id.* at 501-02.

134. *See id.* at 509 (O'Connor, J., concurring in part and dissenting in part).

135. *See id.* at 508.

136. *See id.* at 503-04.

137. *Id.* at 505.

exists.[138] If none, "courts may infer that the relevant administrative agency possesses a degree of leeway to determine" the preemptive effect of its regulations.[139] Justice Breyer's frustration over Congress's inability to state unambiguously the scope of preemption provisions, and his obvious dissatisfaction with the task of interpreting ambiguous language, foreshadowed the Court's return to a focus on implied preemption doctrine.[140]

Commentators observed that the Court's preemption analysis after *Cipollone*, *Myrick* and *Medtronic*, was not a true express preemption analysis but, rather, a veiled implied preemption analysis.[141] Nevertheless, in *Norfolk Southern Railway v. Shanklin*,[142] the Court continued its reliance on express preemption provisions, this time under the Federal Railroad Safety Act (FRSA).[143] The FRSA preemption provision states that laws, regulations and orders related to railroad safety "shall be nationally uniform to the extent practicable,"[144] recognizing that state and local regulations occasionally may be necessary to ensure that specific local needs are met. States may regulate in an area, therefore, until the Secretary of Transportation prescribes a regulation; then the State is ousted from authority. In an earlier case involving this preemption provision, *CSX Transportation Inc. v. Easterwood*,[145] the Court concluded that the language of the FRSA's pre-emption provision dictates that, to pre-empt state law, the federal regulation must "cover" the same subject matter, and not merely "'touch upon' or 'relate to' that subject matter."[146]

The plaintiff in *Shanklin* was injured at a railroad crossing where federally funded warning signs had been installed and approved by the Federal Highway Administration (FHWA), but no particularized finding of the

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138. *Id.*

139. *Id.*

140. Justice O'Connor, in dissent, relied on the statutory text: "because Congress has expressly provided a pre-emption provision ... 'we need not go beyond that language to determine whether Congress intended the MDA to preempt' state law." The only question remained one of statutory interpretation, which she conducted by textual analysis. *Id.* at 509 (O'Connor, J., concurring in part and dissenting in part).

141. *See, e.g.*, Raeker-Jordan, *supra* note 86, at 1418-19.

142. Norfolk S. Ry. v. Shanklin, 529 U.S. 344 (2000).

143. Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 (1994 & Supp. V 1999).

144. *Id.* § 20106.

145. CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993). *See also* Freightliner Corp. v. Myrick, 514 U.S. 280 (1995).

146. *Easterwood*, 507 U.S. at 664. The regulations in issue in *Easterwood* were found not to pre-empt the state law damages action because they only "establish the general terms of the bargain between the Federal and State Governments" for the Crossings Program. *Id.* at 667.

warning's adequacy for the crossing had been made.[147] The Secretary of Transportation had made funds available for installing warnings at railway crossings and promulgated regulations regarding the adequacy of some, but not all, warning devices installed with federal funds.[148] Plaintiff argued that the inadequacy of the warnings supported a negligence action regardless of the general federal approval of the warnings.

The Court found that the federal regulatory scheme regarding railroad crossings expressly preempted the damages action because the crossing warnings were installed with federal funds under FHWA approval and, therefore, the federal regulations "substantially subsumed" the subject matter consistent with the express preemption provision.[149] While the FHWA had not decided the adequacy of the particular warning sign for the location where Shanklin was injured, its approval and subsequent funding defeated an adequacy argument because of the plain meaning of the statute and its regulations.[150]

The Court also explored two additional preemption factors with which it had struggled. First, the Court discussed the importance of the federal agency position on preemption. The FHWA had taken a position in *Easterwood* in favor of preemption.[151] In *Shanklin*, the FHWA changed its position and argued for a more limited interpretation of the FHWA regulations which would not support preemption.[152] The Court rejected the Government's position because it contradicted the regulation's plain text, and refused to give it deference because of that inconsistency.[153]

Second, the Court discussed the slight impact on the states if preemption occurred. The Court noted that:

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147. *Shanklin*, 529 U.S. at 350.

148. *Id.* at 348-49 (citing 23 C.F.R. § 646.214(b) (1999)).

149. *Id.* at 356, 358-59.

150. *Id.* at 353-54.

151. *Easterwood*, 507 U.S. at 670. The FHWA, appearing as *amicus curiae* in *Easterwood*, interpreted the regulation as follows:

> The warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted.

Shanklin, 529 U.S. at 354-55 (quoting Brief of Amicus Curiae United States of America at 24, CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993) (Nos. 91-790 and 91-1206)).

152. *Shanklin*, 529 U.S. at 355.

153. *Id.* at 356.

> Nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What states cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices.[154]

This notion that states have alternative ways to address risk without reliance on private damages actions provides an insight into how the Court's assessment of regulatory purposes is evolving. If the states have an alternative method to accomplish the regulatory result they seek, their interest in applying common law tort principles as the preferred method of regulation is reduced.

Shanklin, following *Cipollone*, *Myrick*, and *Medtronic* as an express preemption case, seemed to solidify the Court's focus on express preemption analysis. One year later, the Court had an opportunity to clarify its express preemption analysis and the interpretive methods to be used under that analysis. In *Geier v. American Honda Motor Company*,[155] the Court stated clearly that express preemption analysis is not exclusive, but rather, implied preemption principles are of primary importance in determining preemption.[156] In addition, *Geier* illustrates quite clearly the Governmental Interest Analysis-type approach the Court has adopted for determining whether an actual conflict exists to trigger the Supremacy Clause's default to federal law.

In *Geier*, the Court was asked to analyze the effect of the express preemption provision in the National Traffic and Motor Vehicle Safety Act (NTMVSA) on a lawsuit alleging that a 1987 Honda was defective in design because it did not have a driver's side air bag.[157] The NTMVSA contains a preemption provision, also at issue in *Myrick*, which states that whenever a federal motor vehicle safety standard, "FMVSS,"[158] is in effect, states may not

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154. *Id.* at 358.

155. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000). *Geier* is a five to four opinion, Justice Breyer writing for the majority, joined by Chief Justice Rehnquist, Justices O'Connor, Scalia and Kennedy. *Id.* Justice Stevens, the author of both the *Cipollone* and *Medtronic* plurality opinions, dissented in an opinion in which Justices Souter, Thomas, and Ginsburg joined. *Id.* at 886 (Stevens, J., dissenting).

156. The Court missed an opportunity to clarify the manner by which express preemption provisions are to be interpreted, whether narrowly as in *Cipollone* or by broader reference to legislative and administrative history. *See* Davis, *supra* note 4, at 1008-09 (criticizing *Geier* for its failed analysis of the express preemption provision); Raeker-Jordan, *supra* note 90, at 16-17 (criticizing *Geier* for putting "its thumb on the scale" of the analysis by presuming implied preemption in its interpretation of the express preemption provision). For a call to return to the exclusivity of express preemption analysis, see Ausness, *supra* note 4, at 968-71.

157. *Geier*, 529 U.S. at 865; National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* (1988). The statute was re-codified in 1994 at 49 U.S.C. §§ 30101-30169 (1994 & Supp. 1999) (current version at 49 U.S.C. §§ 30101-30170 (2000)).

158. 15 U.S.C. § 1391(2) (1988) (stating that the safety standard is a "minimum standard for motor

establish or continue any "safety standard applicable to the same aspect of performance" which is not identical to the federal standard.[159] The statute also contains a "savings clause": "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[160]

The Department of Transportation issued FMVSS 208 regarding Occupant Crash Protection in 1967, and continually revised it.[161] Its 1984 version, which permitted manufacturers to choose between air bags and seat belt systems, was in issue in *Geier*. Manufacturers were required to use driver's side air bags as of 1989.[162] Ms. Geier's 1987 Honda did not have a driver's side air bag. She was injured as a result and sued the manufacturer based on the vehicle's defective design.

The Court concluded that the express preemption provision did not preempt plaintiff's action, but it conducted no textual analysis of the statute's language as it had in previous cases.[163] Rather, the Court read the express preemption and savings clauses together, concluding that the phrase "safety standard" in the express provision, coupled with the savings clause, permitted a "narrow reading" that excludes common law damages actions.[164] The Court then asked whether the savings clause does more: "In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as preempting state laws (including common law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder?"[165] The Court concluded it did not.[166]

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vehicle performance, or motor vehicle equipment performance").

159. *Id.* § 1392(d) (current version at 49 U.S.C. § 30103(b)(1) (2000)).

160. *Id.* § 1397(k).

161. *See* Pub. Citizen v. Steed, 851 F.2d 444, 445 (D.C. Cir. 1988) ("Passive restraint regulation (Standard 208) has advanced over the years along a protracted, winding, sometimes perilous course."). *See also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34-38 (1983) (discussing the history of Standard 208).

162. *Geier*, 529 U.S. at 865. *See* 49 C.F.R. § 571.208 (2003). For a full discussion of the administrative history of FMVSS 208, see *Geier*, 529 U.S. at 875-77; *id.* at 889-92 (Stevens, J., dissenting). *See also* Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996).

163. *Geier*, 529 U.S. at 867.

164. *Id.* at 867-68.

165. *Id.* at 869. Justice Breyer, writing for the majority, articulates a three-part preemption analysis. *Id.* at 867. First, does the express preemption provision pre-empt the lawsuit? *Id.* If not, "do ordinary pre-emption principles nonetheless apply?" *Id.* If so, does the lawsuit "actually conflict" with the federal statute? *Id.*

166. *Id.* at 874.

The majority opinion never mentions the presumption against preemption.[167] The Court did not refer to the legislative history nor to the purposes of the statute in its express preemption analysis.[168] Rather, it focused on the following:

> Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to "destroy itself."[169]

The Court's decision to apply implied preemption principles based on an actual conflict analysis borrows unknowingly from Governmental Interest Analysis.

The Court's assessment of whether an "actual conflict" existed in *Geier* illustrates the important factors in making that determination. First, recall that the Court did not mention the presumption against preemption. This suggests that the previous "default" to state law that might have occurred under such a presumption is gone, and a "default" to federal law inherent in the Supremacy Clause has taken its place. The Court also rejected a categorization of its implied preemption doctrine, and thus, "s[aw] no grounds . . . for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case."[170] The Court suggested a case-by-case conflict analysis, similar to the type of conflict analysis Professor Currie suggested should occur under Governmental Interest Analysis.

The Court in *Geier* found an actual conflict between the federal standard, statutorily defined as a minimum standard of care,[171] and state common law

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167. *See* Davis, *supra* note 4, at 1008; Raeker-Jordan, *supra* note 86, at 1408-09.

168. *See Geier*, 529 U.S. at 867-68. In the face of a seemingly unambiguous statute, Justice Breyer in *Geier*, who concurred in *Medtronic* and complained about the highly ambiguous nature of many Congressional preemption provisions, raises questions about Congress's purposes, saying:

> It is difficult to understand why Congress would have insisted on a compliance-with-federal regulation precondition to the [savings' clause's] applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the *objectives of federal safety standards promulgated under the Act.*

Geier, 529 U.S. at 870 (emphasis added).

169. *Id.* at 872.

170. *Id.* at 874.

171. 49 U.S.C. § 30102(a)(9) (2000).

damages actions which permit a jury to reject that standard as insufficient to define reasonable care and product non-defectiveness. The Court rejected as conclusive the statutory definition of FMVSS 208 as a minimum standard in spite of the statutory language, and reviewed carefully the objectives of the regulation itself. The various positions over the years of the Secretary of Transportation were very influential.[172] The Court relied on the agency's comments on the standard and the current Secretary's position, expressed "through the Solicitor General, [that] the 1984 version of FMVSS 208 'embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.'"[173] The Court's detailed review of the regulation identified the Secretary's efforts to balance a variety of concerns which impacted its primary objective of consumer safety, including obstacles to consumer acceptance of restraint devices, industry reluctance to adopt restraint devices, and Congress's responses to a variety of public pressures regarding the restraints.[174]

The following factors were important in the balancing act that resulted in FMVSS 208: (1) Promotion of Safety: Fastened seatbelts are a vital safety ingredient but a large percentage of the population does not buckle up and air-bags would reduce risk, though not entirely; (2) Consequential Reduction in Safety: Consumer disapproval and rejection of passive restraints might increase risks, coupled with increased risks to certain members of the population whom air bags might injure more severely; and (3) General economic concerns: Cost might prevent consumer acceptance and influence industry action.[175] The Court emphasized the Secretary's deliberate and expert balance that allowed a variety of manufacturer choices, permitted gradual phase-in of the air bag requirement, and encouraged state regulation through mandatory seat-belt laws that could lead to rescission of the passive restraint requirement.[176]

In defining the state law concerns relevant to assessing actual conflict, the plaintiff argued that a jury finding on the need for an air bag to satisfy the manufacturer's reasonable care obligation did not conflict with the federal objectives of consumer safety; indeed, state law promoted those objectives.

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172. *Geier*, 529 U.S. at 875-80 (relying on Secretary's comments in Department of Transportation rule-making in 1984).

173. *Id.* at 881.

174. *Id.*

175. *Id.* at 877-78.

176. *Id.* at 880.

State laws defining tort duties are content-driven and encourage a specific type of action. In state tort law, the means to achieve that objective is the payment of compensatory damages to the injured party, not the requirement of a specific design choice.[177] Nevertheless, the Court was of the strong opinion that the state and federal objectives could not be reconciled:

> Such a state law—*i.e.* a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . . It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.[178]

The court further described the Federal objectives as "means-related." While the Court acknowledged that Congress intended some non-uniformity in the regulatory system it created, it concluded that jury-assessed standards would lead to unpredictability and uncertainty in the standard of due care.[179]

The plaintiff also asked the Court to define the size of the "obstacle" so that it might be minimized and, therefore, narrow the scope of the federal objectives to permit some limited category of common law damages actions. After all, *Geier* involved an accident that occurred three years after FMVSS 208 required driver's side air bags.[180] The Court reluctantly rejected that suggestion, acknowledging that "tort law may be somewhat different, and that related considerations—for example, the ability to pay damages instead of modifying one's behavior—may be relevant for pre-emption purposes."[181] The Court indicated that "incentive or compliance considerations" may be relevant under some circumstances but not in this case. The Court concluded this, in part, due to its understanding of the peculiar remedial scheme the federal regulators had endorsed in FMVSS 208.[182]

Finally, the Court emphasized the importance of the Secretary's position on the scope of FMVSS 208. The Court justified this reliance based on (1) the technical subject matter; (2) the complex and extensive nature of the relevant history and background; and (3) the agency's "uniquely qualified" position to

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177. *Id.* at 880-81. For a contrary discussion of federal objectives in automotive safety, see Nader & Page, *supra* note 162, at 419-26 (arguing that congressional intent in the area of motor vehicle safety has always permitted the parallel operation of state common law to fulfill the federal objective of public safety).

178. *Geier*, 529 U.S. at 881.

179. *Id.*

180. *Id.* at 865. *See also id.* at 901-02 (Stevens, J., dissenting) (suggesting no pressure to exceed the regulation given that so much time had passed, and that federal standards were defined as minimum standards).

181. *Id.* at 882.

182. *Id.*

comprehend the likely impact of state requirements.[183] The consistency of the Secretary's position on preemption over time was influential in finding an actual conflict requiring preemption.[184]

Geier makes several things clear. The presumption against preemption is virtually irrelevant.[185] The Court placed very limited reliance on express preemption provisions,[186] and firmly placed the weight of preemption analysis in the hands of conflict implied preemption. Determining whether a conflict exists will involve an assessment of: (1) the federal objectives at stake, as identified through the legislation and its history; (2) the position of the relevant government agency on the scope of the regulation; (3) the substantive/safety concerns versus the economic/remedial concerns at stake; (4) the value of uniformity and certainty in the regulatory scheme; and, finally, (5) an assessment of the value, in the particular case, of tort law in the regulatory scheme.

Since *Geier*, the Court has had a few occasions to elaborate on the definition of an actual conflict. In *Buckman v. Plaintiff's Legal Committee*,[187] the Court again was called on to interpret the Medical Device Amendments, this time to determine whether the MDA preempted the plaintiff's fraud claim based on the defendant's misrepresentations to the FDA to obtain device approval.[188] The Court swiftly and authoritatively applied implied conflict preemption principles,[189] and began its discussion by noting that states do not have any interest in matters "inherently federal in character," including the protection of a federal agency from fraud.[190] The federal regulatory scheme empowers the FDA to protect itself from and to deter fraud, and the Court

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183. *Id.* at 883.

184. *Id.* For a proposal that would consider agency determinations of preemption only if they were part of the rule-making process when the regulation was formulated, *see* Ausness, *supra* note 4, at 968-69.

185. *See supra* note 167 and accompanying text. The presumption against preemption has surfaced occasionally in the negative as "an assumption of non-preemption" that is not triggered in areas of significant federal presence. United States v. Locke, 529 U.S. 89, 108 (2000) (involving preemption of state policies regarding Burma).

186. *See supra* notes 163-66 and accompanying text. *But see* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying an express preemption provision of the cigarette labeling laws to expressly preempt state advertising regulations).

187. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

188. *Id.* at 344-47. For a complete description of the fraud allegations, see Ausness, *supra* note 4, at 960-62 and Owen, *supra* note 16, at 432-34.

189. *Buckman*, 531 U.S. at 348 n.2 ("[W]e express no view on whether these claims are subject to express pre-emption. . . ."). The Court also swiftly concluded there was no presumption against preemption where the interests at stake are uniquely federal. *Id.* at 347.

190. *Id.*

explored the FDA's enforcement mechanisms.[191] The Court emphasized the need for flexibility in the FDA regulatory scheme given its other "difficult (and often competing) objectives," including generally protecting medical care practitioners from unnecessary interference.[192] The Court did not mention the FDA's position on the preemption question, central to *Medtronic* and *Geier*, but the concurring opinion notes that the FDA had waffled on the preemptive effect of its regulatory objectives on state fraud-on-the-FDA claims.[193]

The Court then evaluated the state law interest at stake. The tort law deterrent effect could increase burdens on the pharmaceutical industry, potentially discouraging the request for approval of devices that might have beneficial off-label uses, in contravention of the stated goal of non-interference with medical practice.[194] Similarly, the cost that recognizing state law would impose on the industry could create approval delays of valuable devices, agency administrative inefficiency, and delay in the provision of health care.[195] The Court saw no corresponding benefit to the application of state law because it was not based on a common law duty of care, but rather on a federal regulation.[196]

The Court's next preemption opinion, *Sprietsma v. Mercury Marine*,[197] provides additional support for the proposition that the Court is resolving implied conflict preemption matters using a Governmental Interest Analysis approach. *Sprietsma* involved allegations of design defects against manufacturers of recreational boats that did not have propeller guards.[198] The Federal Boat Safety Act of 1971 (FBSA),[199] gave the Secretary of Transportation authority, delegated to the Coast Guard, to establish "a

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191. *Id.* at 348-49.

192. *Id.* at 349-50.

193. *Id.* at 354 n.2 (Stevens, J., concurring). Justice Stevens stated:

> Though the United States in this case appears to take the position that fraud-on-the-FDA claims conflict with the federal enforcement scheme even when the FDA has publicly concluded that it was defrauded and taken all the necessary steps to remove a device from the market, that has not always been its position. As recently as 1994, the United States took the position that state-law tort suits alleging fraud in FDA applications for medical devices do not conflict with federal law where the FDA has "subsequently concluded" that the device in question never met the appropriate federal requirements and "initiated enforcement actions" against those responsible . . . .

Id. (citation omitted).

194. *Id.* at 350.

195. *Id.* at 351.

196. *Id.* at 352-53.

197. Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).

198. *Id.* at 55. Plaintiff's wife had been thrown from a boat and was killed when struck by the propeller blades. *Id.* at 54.

199. 46 U.S.C. §§ 4301-4311 (2000).

coordinated national boating safety program" including authority to promulgate uniform safety standards for boating equipment.[200] The Coast Guard authorized a study in 1988 of the viability of requiring propeller guards and concluded, after gathering data and holding public hearings, *not* to require such guards for reasons of safety, feasibility and economics.[201] The Coast Guard revisited the issue in subsequent years, each time deciding not to require such guards.[202]

In defense of Sprietsma's claim of design defect, the manufacturer argued that the Coast Guard's decision not to require a propeller guard preempted the claim.[203] The FBSA contains both an express preemption provision and a savings clause.[204] The Court, consistent with *Geier*, found no express preemption and turned promptly to an actual conflict preemption analysis.[205]

In *Sprietsma*, as in *Geier* and *Buckman*, the Court assessed the strength of the federal and state governmental policies at stake to determine whether an actual conflict was presented. The Court noted that the emphasis of Coast Guard regulations has been to preserve state authority pending the adoption of specific federal regulations.[206] A corollary to the regulatory history, then, was the Coast Guard's position on preemption: "[It] has never taken the position that the litigation of state common-law claims relating to an area not yet subject to federal regulation would conflict with" its objectives.[207] The Court stated that "[i]t is quite wrong to view [the decision not to adopt a propeller guard requirement] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation."[208] While the Court noted that a federal agency decision not to

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200. S. REP. NO. 92-248, at 1333-35 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333.

201. *Sprietsma*, 537 U.S. at 60-61. The Coast Guard referred the study to the National Boating Safety Advisory Council, as required under 46 U.S.C. § 4302(c)(4) (2000), which appointed a special subcommittee to complete the study. *Id.* In a letter to the Advisory Council, the Chief of the Coast Guard's Office of Navigation Safety and Waterway Services, in agreement with the subcommittee's findings, stated that the data did not support the adoption of a regulation requiring propeller guards. However, the letter stated that the Coast Guard would continue to monitor the issue for additional information on the state of the design art. *Sprietsma*, 537 U.S. at 61 (quoting 1990 letter to the Advisory Council).

202. *Sprietsma*, 537 U.S. at 61-62. The Advisory Council recommended certain regulations in 2001, none of which required or prohibited propeller guards, and the Coast Guard has indicated that the recommendation will be addressed in "subsequent regulatory projects." *Id.* at 62.

203. *Id.* at 54-56.

204. *Id.* at 58, 63.

205. *Id.* at 63-64.

206. *Id.* at 65.

207. *Id.* at 65-66. The Court emphasized the Government's consistent position that the regulation did not have any pre-emptive effect. *Id.*

208. *Id.* at 65.

regulate might have preemptive force, the Court found no such force in this case because of the factors motivating the Coast Guard's decision: the uncertain effect on safety, the uncertain technical feasibility, and the economic effect on boat owners and the industry.[209] Consequently, although the decision not to regulate was well-thought out, it did not suggest an "authoritative" message of federal policy.[210] Because no federal objective was implicated in the decision not to regulate, the Court did not have to explore the contrasting state interest behind state law damages actions.

The Court also discussed the general federal interest in uniformity of regulations as a further objective of the FBSA, but rejected it as insufficient, without more, to create a conflict.[211] The Court recognized that a more substantial indication of congressional desire to preempt would have to be found to support such a preemptive scope, stating that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's *more prominent objective* . . . of promoting boating safety."[212]

With *Sprietsma*, the Court's implied conflict preemption analysis has taken full shape. That analysis seeks to balance the preeminence of federal law inherent in the Supremacy Clause with coexisting state policy objectives.[213] Because the Court's analysis emphasizes a variety of factors in assessing the policies and objectives that underlie the federal and state laws in issue, it has integrated a choice of law analysis, specifically a version of Governmental Interest Analysis, into its implied conflict preemption doctrine. As will be seen in the next section, when viewed through the lens of choice of law theory, the Court's implied conflict preemption doctrine has achieved some semblance of consistency and predictability.

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209. *Id.* at 69-70.

210. *Id.* at 67.

211. *Id.* at 70. The defendant had argued that the FBSA entirely occupies the field of manufacturing regulations in pursuit of boating safety. The Court found no "clear and manifest intent" to preempt all state regulations. *Id.* at 69.

212. *Id.* at 70 (emphasis added). For a contrary view of the importance of uniformity in maritime preemption matters, see Joshua S. Force, Sprietsma v. Mercury Marine: *The Supreme Court Misses the Boat on Maritime Preemption*, 27 TUL. MAR. L.J. 389, 391 (2003) (arguing that the Court inappropriately ignored maritime principles and the need for uniformity regarding them).

213. Many commentators consider the Court's implied conflict preemption analysis ill-conceived because of its failure to consider sufficiently the historic state interest in public health and safety. Davis, *supra* note 4, at 1014-15; Raeker-Jordan, *supra* note 90, at 43-44. *See also* Nelson, *supra* note 5, at 303-04 (advocating rejection of obstacle implied preemption for "a more careful analysis of the rules established by the particular federal statute in question").

III. INTEGRATING PREEMPTION AND CONFLICT OF LAWS THEORY

The Supreme Court's implied preemption doctrine requires that the Supremacy Clause's default to federal law operate only when an actual, or true, conflict exists. The Court's express preemption analysis, which more specifically seeks the scope of Congress's express preemptive intent, also incorporates notions of Governmental Interest Analysis. Through recent preemption cases involving common law damages actions, the Court has increasingly incorporated into its preemption analysis features that bear a marked resemblance to Governmental Interest Analysis and its corollary, Comparative Impairment, to identify an actual conflict and then to resolve it.

This section discusses the application of Governmental Interest Analysis and Comparative Impairment to preemption doctrine. It explains the value of such an analysis to federal-state preemption doctrine. Then it identifies how the Court's preemption cases break down into false conflicts and true conflicts. This section discusses the important similarities, and acknowledges the differences, between the noted conflict of laws theories and their application to federal preemption. The factors the Court has used to identify actual conflicts are examined and applied; this effort will clarify the Court's preemption analysis and enable greater predictability of its future application. Finally, this section explains the normative value of Governmental Interest Analysis and Comparative Impairment as applied to federal preemption.

At first blush, it may appear that a theory that resolves conflicts between the laws of equal sovereigns is not applicable to a conflict between the laws of unequal sovereigns. The Supremacy Clause acknowledges this inequality in our federal system by its choice of federal law as the default position. Determining *when* that default rule operates, however, need not require special emphasis on federal goals or policies. The Court's reliance on an actual conflict analysis recognizes the delicate balance, born of our federal system, that preemption doctrine must strike between the legitimate claims of two sovereigns, much like the balance sought by any choice of law theory.

Under any choice of law theory, a court must obey the legislative directive of its jurisdiction on choice of law. Similarly, Congress can articulate preemptive scope if it so desires, and the Court recognizes the importance of such a directive. When Congress does speak regarding preemptive scope, it is clearly exercising its prerogative as the "greater"

sovereign, and its intent should control.[214] If it does not, or when its intent is unclear, and implied preemption doctrine applies, recognizing the importance of the states in our federal system and favoring a definition of actual conflict that respects state policy objectives is both legitimate and necessary. Governmental Interest Analysis does this well by counseling in favor of a restrained assessment of governmental policies to reflect respect for all interested sovereigns.

Moreover, the Court has acknowledged that implied preemption does not rest on a search for congressional intent, but rather is an *ex post* assessment of whether, in the given case, federal objectives are thwarted by the concurrent operation of state law.[215] In such circumstances, a dispassionate determination of policy objectives, unaffected by which sovereign is the "greater" of the two, benefits both sovereigns by recognizing the legitimate and valuable goals which both would recognize. By treating the involved sovereigns as equals for purposes of assessing the existence of an actual conflict, therefore, the goals shared by both will be recognized and effectuated more frequently. When only one sovereign's policy objectives are implicated in the underlying matter, no reason exists to defeat those legitimate policy objectives, regardless of whether the two sovereigns are co-equal or unequal. The Supremacy Clause's default to federal law in the case of an actual conflict exalts the "greater" sovereign's objective, therefore, only when it matters, but not when it does not. This resolution is entirely consistent with our federal-state balance.

The default-to-federal-law rule of the Supremacy Clause applies, consistently with conflict of laws theory, only in the event of an actual conflict between the purposes of the underlying laws. If the objectives behind the federal law or regulation in issue would not be furthered through application in the given case, there is no reason to foreclose the operation of state law. No Supremacy Clause purpose is served by disregarding a valid sovereign state interest with no corresponding federal policy benefit to substantiate it. This important lesson from Governmental Interest Analysis is reflected in the Court's actual conflict implied preemption doctrine.

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214. Many commentators criticize the Court's express preemption analysis as unfaithful to congressional intent and seek a greater role for express preemption analysis. *See* Ausness, *supra* note 4, at 969-71. For examples of express preemption analysis, see *supra* notes 103-16, 124-54 and accompanying text (discussing *Cipollone*, *Medtronic*, *Easterwood* and *Shanklin*).

215. *See supra* notes 167-84 and accompanying text (discussing *Geier* and its actual conflict preemption analysis).

Because Governmental Interest Analysis relies on a thorough articulation of the respective state policy objectives in issue, one must determine the sources of those objectives to determine whether they are in purposive conflict in the given case. The Supreme Court, similarly, has engaged in a purposive assessment in preemption to determine the existence of an actual conflict based on whether the federal objective will be frustrated if state law is permitted to operate. Determining the scope of the purposes behind the respective laws in issue is, therefore, central.

The Court engages in a wide-ranging assessment of the sources of federal objectives to determine whether they are implicated in the given case. In doing so, the Court reviews the federal statute in issue and the history behind any regulations promulgated under the statute.[216] Acknowledging the importance of this act of statutory interpretation is one of the primary contributions of Governmental Interest Analysis in conflict of laws. The task it requires is the same one with which courts are comfortable in other, domestic contexts, and one in which the Court has often engaged to resolve conflicts in other contexts.[217] Its use in implied preemption analysis is unremarkable.

Many observers will be distressed at the flexibility of this feature of the Court's implied preemption doctrine: determining federal objectives independent of an assessment of Congress's intent is a challenge to which courts are not well-suited. *A fortiori*, courts should not rely on *ex post* assessments of those objectives. For this reason, some have argued, the exclusive assessment of the scope of an applicable express preemption provision, with only extremely narrow exceptions, might be the best approach. Determining congressional intent in the context of such provisions has not been easy for the Court, however, and it rejected that analysis almost as soon as it had endorsed it.[218] Moreover, after *Geier*, the Court is now clearly and

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216. *See supra* notes 170-76 and accompanying text. The Court has said, "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (discussing preemption of state economic regulation by congressional intent to give the President authority over economic sanctions of Burma).

217. For example, the Court used a purposes assessment recently in assessing the scope of the foreign affairs power, located firmly in the executive branch, as it relates to the states' ability to regulate insurance, a purely state-governed subject. Am. Ins. Assoc. v. Garamendi, 539 U.S. 396 (2003). Similarly, the Court has often used a purposes assessment to determine how to resolve conflicts between inconsistent federal rules and statutes. Marek v. Chesny, 473 U.S. 1 (1985) (applying a purposes analysis to resolve conflicts between Fed. R. Civ. P. 68 on offer of judgment and 28 U.S.C. § 1988 on attorneys fees in civil rights cases). Other examples are found in CURRIE ET AL., *supra* note 1, at 120.

218. *See supra* notes 103-16, 124-40 and accompanying text (discussing *Cipollone* and *Medtronic*

firmly dedicated to implied conflict preemption analysis.[219] Given that the Court is intent upon engaging in a purposive analysis, applying a Governmental Interest Analysis to determine an actual conflict will give content and structure to its method.

The importance of policy objectives, and determining the source of those objectives, is a consistent theme of both Governmental Interest Analysis and federal preemption. One influential source of those objectives is a federal agency's position on the nature of the federal objectives in issue because Congress created agencies to effectuate its legislative mandates. The extent of the influence, however, will depend on the history of, and facts behind, each agency's position.[220] The ultimate effect of the agency's position on the determination of the existence of an actual conflict has depended on two important features of that position: (1) the consistency of the agency's position over time regarding the regulatory objectives, and (2) the agency's position on the preemptive effect of its regulations, both as expressed by the agency historically and for purposes of the current litigation. The Court has refused to be pinned down, however, on the specific level of importance of agency position, preferring to make that assessment on a case-by-case basis.

The Court is right about this balance. Consistent with Governmental Interest Analysis, the nature of policy objectives must be permitted to ebb and flow. The position of an agency on those objectives should be considered when a determination of actual conflict is required. An agency may not need to articulate a specific position on its objectives or preemptive scope absent a conflict which can focus its inquiry. On the other hand, an agency's position may be well-defined, as in the case of the FMVSS 208 in *Geier*. A focus on the history of the agency's position is entirely appropriate to a conflict analysis. Skepticism of the agency's position, particularly if it has changed over time or appears geared solely to a litigation objective, is similarly appropriate. Each of these features of an agency's position is evidence of the nature and strength of the federal objectives as seen in the light of the facts in issue. The Court's treatment of a regulatory agency's position is, for this reason, consistent with the Governmental Interest Analysis emphasis on objectives and its caution to give legislative and regulatory objectives a

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and difficulty with express preemption exclusivity).

219. *See supra* notes 185-86 and accompanying text.

220. *See supra* notes 133, 183-84, 193 and accompanying text (discussing use of FDA position in *Buckman* and *Medtronic* and the DOT's position in *Geier* to be significant support for existence of an actual conflict).

moderate and restrained interpretation in the face of an apparent actual conflict.

Conflict of laws theory also helps explain the Court's treatment of state law objectives in preemption doctrine. First, the presumption against preemption, which the Court now typically only mentions to confirm that it does not apply, is actually a type of default rule that favored state law in matters involving "historic police powers." Such a presumption might help illustrate a starting point for interpreting an express preemption provision, or serve as an evidentiary rule, but it otherwise serves no purpose other than as a tie-breaker in the event of a conflict.[221] The Court rejects the presumption as a starting point in express preemption analysis as inconsistent with a search for congressional intent.[222] In implied preemption cases, the Court finds no place for the presumption.[223] Rather, the Court, consistent with Governmental Interest Analysis, searches for the purposes behind the underlying state laws involved: in tort and products liability matters those purposes typically are to compensate those tortiously injured and thereby deter future tortious behavior. To the extent that states are particularly interested in areas of "historic police powers," the Court's preemption analysis incorporates that interest in the assessment of state objectives behind the rules in conflict. The presumption against preemption is not an inherent element of the Supremacy Clause. It has served over the years as a rather weak surrogate for a clearer definition of state objectives. Those objectives can be given more thorough consideration in the assessment of an actual conflict, where they can be fully explored in the context of a specific case.[224]

A number of cases illustrate the Court's application of Governmental Interest Analysis. Several involved a false conflict situation in which only one of the implicated laws would be advanced if applied. For example, both *Myrick* and *Sprietsma* quite clearly involve false conflicts. In neither case had

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221. Some authors have called for a clear statement rule—that Congress must speak clearly of its preemptive intent—and that the presumption against preemption should operate in absence of such a clear statement. *See, e.g.*, Nelson, *supra* note 5, at 298-303.

222. *See supra* notes 107-16, 163-67 and accompanying text (discussing the tension raised by the presumption in *Cipollone* and its subsequent non-use). *See also supra* notes 187-96 and accompanying text (discussing *Buckman* and its explicit rejection of the presumption).

223. Neither *Geier* nor *Sprietsma*, the Court's most recent implied preemption cases, mention the presumption. *See* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

224. *See* Davis, *supra* note 4, at 1013 (discussing history of the various uses made of the presumption against preemption).

a federal regulatory agency chosen to regulate.[225] In both cases, the regulators had tried to regulate or considered regulation, but no regulation actually resulted from the efforts.[226] In both cases, therefore, the state common law damages action, which would regulate only indirectly, was not in conflict with any other applicable federal regulation. The Court swiftly rejected arguments that a choice not to regulate is, indeed, regulatory, as an overly broad definition of federal objectives.[227] In both cases, the federal regulatory agency confirmed that no federal policy objective would be thwarted if state common law were to apply.[228] Even though *Myrick* was decided as an express preemption case and *Sprietsma* involved implied preemption doctrine, the Court's assessment of both revealed false conflicts.

Medtronic is also most properly viewed as a false conflict case. The Court applied express preemption principles, but the justices were at odds over how to discern congressional intent.[229] The medical device regulations at issue in *Medtronic* did not require the manufacturers to make a particular design choice or to engage in specific manufacturing practices.[230] The FDA did not exercise rigorous oversight of the device; rather, the regulations permitted market approval under one of the least rigorous approval procedures.[231] Consequently, the Court recognized that the federal regulations in issue had a dual purpose: promoting a minimum level of safety and achieving economic efficiency in facilitating devices reaching the market.[232] The FDA's stated position, based on one of its own regulations, was against preemption.[233] With this support, and because the application of common law damages actions would not defeat the identified goals of the regulation, the Court recognized implicitly that the state law purposes behind damages actions would be furthered if applied without impeding the operation of the federal law.

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225. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 286-87 (1995). *See also supra* notes 201-02 and text accompanying notes 120-21, 201-02.

226. *See Freightliner Corp.*, 514 U.S. at 286-87. *See also supra* notes 201-02 and text accompanying notes 120-21, 201-02.

227. *See* Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002); *Freightliner Corp.*, 514 U.S. at 289-90. *See also* text accompanying notes 122, 208.

228. *See Freightliner Corp.*, 514 U.S. at 286-87. *See also supra* note 207 and text accompanying notes 121, 207 (identifying federal position in both cases against preemption).

229. *See supra* notes 128-40 and accompanying text.

230. *See supra* note 130 and accompanying text.

231. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 501-02 (1996). *See also supra* note 130 and text accompanying notes 130, 133.

232. *See Medtronic*, 518 U.S. at 485, 501-02. *See also* text accompanying notes 132-33.

233. *See Medtronic*, 518 U.S. at 501-02. *See also* text accompanying note 133.

A further example of a false conflict is found in *Buckman*, which involved plaintiff's efforts to pursue a fraud-on-the-FDA tort theory because the manufacturer misrepresented certain features of its medical device to the FDA to obtain market approval. There was no stated FDA position on either objectives or preemption; indeed, it was suggested that the FDA had taken inconsistent positions.[234] Nevertheless, the Court made a good case for a false conflict—the only interest at stake was the federal interest in its unique status as gate-keeper for medical devices seeking marketing approval.[235] The state common law damages action would inquire into the FDA's regulatory process and, in essence, challenge that process as policed by the FDA. That interference with the FDA's procedures provided no concomitant state law benefit because there was no common law tort basis which supported the action.[236] Other tort actions, based on unreasonable care in design or manufacture, could already proceed. Further, the Court noted that the state law interest in a fraud-on-the-FDA claim was made weaker by the joint federal-state objective of non-interference with the provision of health care, which might be impeded by such a claim.[237] Consequently, the state had no interest in providing an additional basis of liability.[238] Therefore, either a false conflict existed because the state law objectives were not implicated, or a comparison of federal and state law objectives required the conclusion that federal objectives would be more significantly impaired by the concurrent operation of state law.

Easterwood and *Shanklin*, express preemption cases, also contain features of Governmental Interest Analysis. *Easterwood* represents a false conflict. The Federal Railway Safety Act did not preempt plaintiff's common law actions because the regulations in issue did not prescribe any particular conduct, but rather explained a general allocation of responsibility between the states and the federal government.[239] Consequently, the federal regulatory interest was not implicated.[240] Even though the Government favored preemption because it considered the regulation to establish a substantive

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234. *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 354 n.2 (2001) (Stevens, J., concurring). *See also* text accompanying note 193.

235. *See Buckman*, 531 U.S. at 347-50. *See also* text accompanying notes 190-92.

236. *See supra* note 193.

237. *See Buckman*, 531 U.S. at 349-50.

238. *See id.* at 350. The concurring opinion recognized that a different result might ensue if the FDA had acknowledged the fraud and sought federal enforcement to remedy it. *See id.* at 341, 354 (Stevens, J., concurring).

239. *See supra* notes 145-46 and accompanying text.

240. *See supra* note 146 and accompanying text.

standard for adequate safety when federal funds participated, *Easterwood* did not involve the use of federal funds at the crossing in issue.[241] Consequently, no federal objective was implicated. Once federal funds were implicated, however, according to the Court, preemption would result.[242] *Shanklin* involved that scenario: the same regulation was in issue and the Court found preemption because the state had used federal funds to install a particular warning device.

Shanklin fits somewhat uneasily into the false conflict category, however. The state had used federal funds to install warning devices, but use of those funds did not mean the crossing devices installed were proper for the particular location.[243] The Government, in fact, had altered its previous position and concluded that in some cases preemption should not result because the DOT had not made an adequacy assessment.[244] The Court, however, held the Government to its position in *Easterwood*, which it considered to be consistent with the statute.[245] The Court found a federal objective that would be promoted if applied.

In assessing state objectives, the analysis in *Shanklin* implicitly recognizes that a state common law claim would encourage use of adequate devices by requiring the railroad to compensate for injuries caused by inadequate devices. A restrained interpretation of the federal objective might have disclosed a false conflict, as reflected in the Government's revised position.[246] The Court, however, was influenced by another factor in its definition of state objectives: the state's alternatives to the use of federal funds to obtain crossing devices. According to the Court, the state could create a safer crossing, not by indirectly regulating through common law damages actions against the railroad, but by directly regulating, refusing federal funds, and installing crossing devices it considered adequate with its own funds.[247] Once the state's interest was considered in light of alternatives to achieve its objectives of crossing safety, those objectives did not have to be

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241. *See supra* notes 146-51 and accompanying text.

242. *See* Norfolk S. Ry. v. Shanklin, 529 U.S. 344, 353-54, 356, 358-59 (2000). *See also* text accompanying notes 149-50.

243. *See Shanklin*, 529 U.S. at 348-50. *See also* text accompanying notes 147-48.

244. *See Shanklin*, 529 U.S. at 348-50. *See also* text accompanying notes 147-48.

245. *See Shanklin*, 529 U.S. at 356.

246. *See supra* notes 151-53 and accompanying text. The dissenting opinion also recognized the false nature of the conflict: "The upshot of the Court's decision is that state negligence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy." Norfolk S. Ry. v. Shanklin, 529 U.S. 344, 360 (Ginsburg, J., dissenting).

247. *See Shanklin*, 529 U.S. at 358. *See also* text accompanying note 154.

achieved through common law damages actions. The state objectives were thoroughly assessed, without the cloak of a presumption against preemption preventing the light from shining on them. Consequently, an actual conflict between the federal and state objectives was resolved by recognizing that the objectives of the federal government would be impaired if not applied, and state objectives, broadly defined, could be achieved, albeit by other means. *Shanklin* illustrates an ingenious Comparative Impairment-like resolution of an actual conflict.

The first of the Court's modern preemption cases, *Cipollone*, was arguably one of its most difficult in light of conflict of laws theory. *Cipollone* presented such a difficult case because it involved a true conflict. The Court, only a few years earlier, had recognized the importance in preemption analysis of the common law damages action to state compensatory and deterrence interests.[248] In addition, *Cipollone* was the Court's first effort at relying completely on an express preemption provision. Interestingly, the Court's attempt to interpret Congress's intent is consistent with the Governmental Interest Analysis emphasis on determining the purposes behind laws in conflict through statutory construction and interpretation.[249]

Consistent with Governmental Interest Analysis, a majority of the *Cipollone* Court recognized the value of state regulation in matters of historic state interest and gave content to the compensatory and deterrence objectives behind state common law damages actions through the presumption against preemption.[250] The presumption counseled in favor of a narrow reading of the preemption provision and permitted the conclusion that Congress would not intend to displace state tort law without clearly saying so.[251]

The Court was uncomfortable with the task of determining congressional intent, however. The plurality's interpretation of the two preemption provisions in issue was arguably inconsistent with the narrow reading it said was required.[252] The plurality opinion found no preemption under the 1965 Act because of restrictive wording on preemption, but found preemption of

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248. *See supra* notes 91-102 and accompanying text (discussing *Silkwood v. Kerr-McGee Corp.*).

249. *See supra* notes 20-22 and accompanying text.

250. *See supra* notes 108, 114 and accompanying text.

251. *See supra* notes 98-102 and accompanying text. On this point, however, the justices strongly disagreed. Justice Scalia concluded there was no place for a presumption against preemption when determining congressional intent under an express preemption provision. He stated that finding the plain meaning of the statute was the goal. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 545-46 (Scalia, J., dissenting).

252. *Cipollone*, 505 U.S. at 540-41 (Blackmun, J., dissenting).

some common law actions under a very careful assessment of the 1969 Act.[253] The plurality's interpretation of the 1969 Act bears close resemblance to a restrained interpretation of the federal statute's purposes, one which permitted state law actions that did not conflict with those purposes to survive.[254] For example, plaintiff's express warranty actions were based on the manufacturers' own promises and not based on federal requirements, so common law actions based on express warranties were not contrary to federal law.[255] Actions claiming a failure to warn were based entirely on imposing warnings different from those specifically required by the statute and, thus, were preempted because they would entirely defeat the federal mandate.[256] *Cipollone* can be described, therefore, as a true conflict, resolved by a moderate and restrained interpretation of the federal laws in issue, so that state law claims could survive if they did no violence to the federal requirements.[257]

Like a forum court assessing its own state's objectives in conducting a Governmental Interest Analysis, the Court has a tendency to overstate the objectives behind the federal law in conflict to the detriment of the contrary state law. This tendency to be parochial is an oft-criticized feature of Governmental Interest Analysis.[258] The Court's purposes assessment in *Shanklin*, and, slightly less so, in *Cipollone*, may be criticized on this point. The case which represents the Court's most significant failure in its application of its own version of Governmental Interest Analysis, however, is *Geier*. Under either a moderate and restrained interpretation of federal law, or a Comparative Impairment analysis, *Geier* would have been resolved in favor of the application of state law.

Consistent with a purposes-based analysis, the Court in *Geier* explored the primary policy objectives behind FMVSS 208.[259] The Court explains those objectives as "means-related,"[260] acknowledging that the federal

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253. *See supra* notes 110-12 and accompanying text.

254. *Cipollone*, 505 U.S. at 524-31.

255. *Id.* at 525-26. Similarly, fraud and misrepresentation actions were based on conduct unprotected by the federal law so that state law could regulate it through a damages action and not interfere with federal law. *Id.* at 527-29.

256. *Id.* at 524-25. *But see id.* at 541 (Blackmun, J., dissenting) (discussing the fact that common law damages actions have only an indirect regulatory effect).

257. *But see id.* at 534-35 (Blackmun, J., dissenting) (basing his dissent on the plurality's failure to engage in the narrow reading of the preemption provision it had promised, and making it in light of the legislative history which suggested that no change in preemptive scope was intended by the change in preemptive language from the 1965 to 1969 Acts).

258. *See supra* notes 29-33 and accompanying text.

259. *See supra* notes 173-77 and accompanying text.

260. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000). *See also* text accompanying note

standards themselves are defined in the statute as imposing only minimum safety requirements.[261] The Court went to great lengths to explain the DOT's chosen balance between the obvious public safety objectives in issue and the economic and public relations pressures mitigating against enforcement of an air bag standard.[262] There was no question, however, that adoption of an air bag requirement was the best vehicle design choice to increase consumer safety.[263] Indeed, while the FMVSS 208 permitted alternative passive restraint choices for a limited time period, its clear intent was to encourage the use of more air bags, rather than fewer, and, to that end, included a provision for extra credit for those manufacturers who incorporated air bags into a larger percentage of their vehicles.[264]

The Court was highly influenced by the DOT's position in favor of preemption on this technical subject. That position, consistent over time, was admittedly a balance struck in a way that only regulators in a politically charged environment can achieve. Perhaps that fact alone supports the Court's reliance on the unique qualification of the agency to know the impact that state damages actions would have on the operation of the federal objectives.[265] Nevertheless, the Court's discussion of the importance of the "means" the DOT chose to implement its objectives unnecessarily disregarded the statutory background and history that disfavored preemption.

The Court assessed the state law objectives in the familiar general way—to provide a remedy for injured persons to seek redress for tortiously caused loss and, therefore, to regulate the conduct by imposing its costs on the tortfeasor. The Court overstated the regulatory effect of those damages actions, however, by suggesting that a tort duty must be assumed to impose a specific action on the defendant, to-wit, re-designing its vehicles to include an air bag. The Court had not before considered common law actions to impose such specific prescriptions; rather, the regulatory effect of common law damages actions had always been treated as indirect, requiring payment of compensation to an injured victim without more.

Had the Court engaged in a moderate interpretation of the federal objective, it might have recognized that state common law conduct-regulating

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261. 15 U.S.C. § 1392(a) (2000).

262. *See supra* notes 171-74 and accompanying text.

263. *Geier*, 529 U.S. at 886 (Stevens, J., dissenting) ("There is now general agreement on the proposition 'that, to be safe, a car must have an airbag.' Indeed, current federal law imposes that requirement on all automobile manufacturers.").

264. *Id.* at 880. *See also* 49 C.F.R. § 571.208 (1998).

265. *Geier*, 529 U.S. at 881.

objectives would not significantly impact the federal means-related objectives. A moderate and restrained interpretation would have emphasized the public safety feature of FMVSS 208 which sought increased air bag use and encouraged manufacturers to explore newer technologies to enhance public safety. Any individual tort action in which a jury found a vehicle's design to be defective would arguably provide an additional, but not necessarily contrary, incentive to that end. When, as in *Geier*, the federal objective is means-based, and not content-based, the state law obligation to pay compensatory damages would act, at most, as an additional incentive to achieve the public safety goal the federal standard also seeks. The Court recognized that state common law damages actions often create appropriate incentives[266] to achieve federal safety objectives, but did not complete the analysis.[267] A further comparison of the relative impairment of state and federal law objectives would have disclosed that the state's interest in providing compensation for tortiously-caused loss would be completely thwarted if state law did not apply. If the Court re-considered the regulatory history in light of the actual conflict it identified, and had been less solicitous of the DOT position given its politicized past, it might have concluded that the federal regulatory objective could continue to be achieved with less impairment than the corresponding state objective. A Comparative Impairment assessment of the true conflict would have resulted in a finding of no preemption.

The Court's preemption decisions incorporate a policy-based governmental objectives inquiry, which is the central feature of Governmental Interest Analysis, with a tendency to use Comparative Impairment to bolster the resolution of an actual conflict. A major criticism of Governmental Interest Analysis is its reliance on governmental policies to the exclusion of broader, systemic considerations that encourage uniformity and predictability in the resolution of conflicts.[268] To complete the application of conflict of laws theory to preemption doctrine analysis, are there additional, more generalized objectives, that should be considered?

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266. *See id.* at 882 and text accompanying notes 181-82 (suggesting that tort law may be somewhat different in its effect on preemption because of the manufacturer's ability to choose whether to modify its behavior).

267. *See Geier*, 529 U.S. at 882. *See also* text accompanying note 182.

268. *See supra* notes 29-33 and accompanying text. For a list of general, non-policy, objectives that properly should be included in a choice of law analysis, see *supra* note 52 and accompanying text (discussing list in *Second Restatement*).

When broader considerations, such as uniformity, certainty, and predictability of law, are considered, the Court's implied conflict preemption analysis finds even greater support in conflict of laws theory. Each of these considerations would favor application of federal law because of the general goal of uniformity and predictability behind most federal regulations.[269] The Court has expressed dismay at the disarray that inconsistent jury assessments of conduct have on federal uniformity objectives.[270] To the Court's credit, however, it has not relied excessively on such general federal objectives in implied preemption analysis, but has considered them useful secondary considerations to the primary policy concerns reflected in legislative choices.[271] The objectives of uniformity and predictability could easily swallow any meaningful interest analysis, almost certainly leading to the application of federal law in virtually every instance.[272]

In summary, in each of its recent preemption cases, the Court explored the policy objectives behind the federal and state laws in conflict to determine whether an actual conflict existed. Frequently, the Court concluded that only one of the laws in conflict had an "interest" in being applied: state law in *Medtronic*, *Easterwood*, *Myrick*, and *Sprietsma*, and federal law in *Buckman*. Like Governmental Interest Analysis, the resolution of these false conflicts is something that the Court's implied preemption analysis handles well, particularly when the policy objectives behind the laws in conflict have been fully and fairly assessed. The task of assessing policy objectives is a familiar one for the Court, as the purposes of federal legislation, and regulations promulgated thereunder, have fairly well-defined sources—the statute, the legislative history, the regulations and their history, the rule-making process and information derived throughout that process, and cautious reliance on the position of the agency charged with enforcing the legislation.

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269. For an argument that the Court's preemption doctrine is driven by uniformity of federal regulation and certainty of application of federal regulations, see Davis, *supra* note 4, at 1016-17.

270. *See Geier*, 529 U.S. at 871 ("[T]oo many different safety-standard cooks" might create "conflict, uncertainty, cost, and occasional risk to safety . . . .").

271. The Court reflected the secondary importance of these considerations in *Sprietsma* when it was asked to preempt state common law in a maritime setting based on the stated federal desire for uniform regulations: "Uniformity is undoubtedly important to the industry, ... Yet this interest is not unyielding. . . . [T]he concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety." Sprietsma v. Mercury Marine, 537 U.S. 51, 70 (2002).

272. For a prediction, pre-*Sprietsma*, that the Court would rely on uniformity and certainty to support findings of preemption, see Davis *supra* note 4, at 1014-20.

The Court has less frequently engaged in a moderate and restrained assessment of those federal objectives when an actual conflict appears. Such an assessment might have resolved both *Shanklin* and *Cipollone*. The Court's use of a Comparative Impairment analysis to resolve identified actual conflicts arguably explains both those cases, however. The Court engaged in a type of Governmental Interest Analysis in both *Cipollone* and *Shanklin* to determine the intent of Congress and closely assessed which state laws could operate within that intent. The Court also noted in these cases that state law is not to be treated as a piece, and that states have choices to accomplish their goals in addition to the common law damages action.

In determining the state law objectives in issue, the Court rejected the presumption against preemption which might have supported application of state law. This presumption operated contrary to the required presumption in the Supremacy Clause that defaults to federal law. Consistent with Governmental Interest Analysis, though, the Court has used an understanding of the importance of state regulation in matters of historic state interest to serve as a surrogate for the presumption against preemption when assessing state objectives and interests to determine actual conflict.

Governmental Interest Analysis is often criticized because of the difficulty of defining the policies and purposes behind the laws in conflict and an overzealousness by forum courts in broadly defining their own state's interests in the underlying claims. As applied in preemption analysis, however, the criticism is weak. The Supreme Court has often used a purposive analysis in assessing congressional objectives in other contexts, and applying that familiar method to preemption cases does not require a different methodology. Further, the identification of interests that implicate the policies in conflict is not as troublesome in preemption cases as in Governmental Interest Analysis because the interests in preemption matters are not case specific, but rather global in nature. States have a general interest in regulating tortious conduct through the common law; the federal government has a general interest in insuring its regulations apply unimpeded. The Court's assessment of the strength of these interests is necessarily general and need not involve a determination of whether a particular governmental policy should benefit a particular party or not.

The Court's assessment of federal interests in preemption cases, express or implied, has not resulted in an overzealous application of federal interests culminating in operation of the Supremacy Clause default to federal law. Only in *Geier* was the Court's identification of an actual conflict the arguable result of unnecessary reliance on agency position and an insufficient

comparative assessment of the state versus federal impairment which would result from the preemption of state law.

The application of conflict of laws theory to the Court's preemption doctrine provides insight into the Court's methodology for application of the Supremacy Clause. That methodology is a Governmental Interest Analysis which relies on a fair, but broad, assessment of federal governmental objectives informed by: (1) statutory and regulatory objectives as found in the federal legislation and its rule-making history; (2) the enforcing agency's current and historic position, particularly in the case of technical, complex matters and where internally consistent; (3) a restrained assessment of federal objectives to determine when those objectives are actually implicated; and (4) an assessment of the impairment of the respective federal and state objectives to confirm an apparent, actual conflict. The Court recognizes the importance of state tort law objectives to regulate conduct indirectly and acknowledges that such laws can operate concurrently with federal objectives in many circumstances. The Court has engaged in a comparison of the impact of preemption on the accomplishment of state objectives in confirming the existence of an actual conflict and applying the Supremacy Clause's default rule.

IV. CONCLUSION

Governmental Interest Analysis in choice of law theory provides that governmental policies and objectives should govern the determination of what law should apply in the event of a conflict.[273] Those policies and interests are identified by a review of the purposes and objectives behind the law derived by methods of statutory interpretation, coupled with an assessment of whether the facts in the actual dispute suggest an interest in applying the law to further those purposes and objectives. According to Governmental Interest Analysis, when an actual conflict exists, the court of a sovereign should not engage in a balancing of its own and another sovereign's policies and interests; to do so would violate core notions of respect for sovereign prerogatives. Consequently, a forum state court must apply its own interested law in the event of an actual conflict. The forum should ensure it has accurately assessed its own and other interested states' policies before concluding that a true conflict exists. But, when an actual conflict is present—in other words, when both sovereigns are interested in application of their law—a choice must

273. CURRIE, SELECTED ESSAYS, *supra* note 12, at 109.

be made, and Governmental Interest Analysis proposes that forum state law should apply.

The Supreme Court applies the default rule required by the Supremacy Clause in much the same way that Governmental Interest Analysis would require a default to forum law in the event of an actual conflict. The determination of an actual conflict, in both choice of law theory and preemption analysis, is the critical feature of the analysis. The Court's preemption cases employ a search for actual conflict that borrows significantly from the factors courts used to identify false and true conflicts in Governmental Interest Analysis. Those factors include the legislative policy objectives in issue, informed by the promulgating agency's determination of that policy and the consistency of its position, the policies that inform generally the area of state law in issue, the alternatives available to both the federal and state regulatory systems to satisfy those objectives, and, secondarily, the value of uniformity and predictability in the subject area.

These two analyses, Governmental Interest Analysis and preemption doctrine, represent normative judgments about the importance of respecting sovereign policy choices. Governmental Interest Analysis reflects a balancing of fundamental values of comity, respect for the authority of other sovereigns, and promotion of legitimate policy objectives, and has been described as "neutral and non-judgmental."[274] This is one of the values of Governmental Interest Analysis for federal preemption doctrine. The Supreme Court's struggle with preemption doctrine, often described in unflattering terms[275] because of its perceived inconsistency, may reflect an effort, similar to Governmental Interest Analysis, to achieve neutrality and objectivity in balancing these values in the preemption context.

Future preemption cases will be benefitted by an analysis that refers to the Court's use of Governmental Interest Analysis and Comparative Impairment to identify and resolve actual conflicts.[276] The moderate and restrained

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274. *See* Sedler, *supra* note 29, at 235.

> In conflicts torts cases, interest analysis does not favor plaintiffs or defendants or support one view of tort law over another. It does not classify a rule of substantive tort law as "progressive" or "regressive," "good" or "bad." It looks only to the policy reflected in a state's law and that state's interest in applying its law in order to implement that policy in the particular case. As a state's law changes, its policies and interests will change accordingly.

Id.

275. For a list of critical comments regarding the Supreme Court's preemption jurisprudence, see Owen, *supra* note 16, at 412 n.2.

276. A number of federal regulatory schemes involve preemption issues including Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136(y) (2000); Consumer Product Safety Act

assessment of governmental objectives, as disclosed by a reasoned review of the statutory language and legislative and regulatory history, with an appreciation of the concurrent role of the states in promoting public safety, will resolve many seeming conflicts between federal and state laws.

(CPSA), 15 U.S.C. §§ 2051-2084 (2000); Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-1278 (2000); and Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. §§ 301-397 (2000). Each of these statutory schemes has already seen a significant number of preemption matters addressed. *See, e.g.*, Dow Agrosciences LLC v. Bates, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 2903 (2004) (addressing FIFRA); Colon v. BIC USA, Inc., 136 F. Supp. 2d 196 (S.D.N.Y. 2000) (addressing CPSA); Motus v. Pfizer Inc., 127 F. Supp. 2d 1085 (C.D. Cal. 2000), *aff'd on other grounds*, 358 F.3d 659 (9th Cir. 2004) (addressing FDCA). Under any of these regulatory schemes, the preemption doctrine described in this article can be usefully applied.